

Plaintiffs' Request for an Order
for Google to Show Cause for
Why it Should Not Be Sanctioned
for Discovery Misconduct

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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
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 individually and on behalf of all similarly
 situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

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Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' REQUEST FOR AN
 ORDER FOR GOOGLE TO SHOW
 CAUSE FOR WHY IT SHOULD NOT
 BE SANCTIONED FOR DISCOVERY
 MISCONDUCT**

Referral: The Honorable Susan van Keulen

REQUEST FOR AN ORDER TO SHOW CAUSE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

The undersigned respectfully asks the Honorable Susan van Keulen of the United States District Court for the Northern District of California to issue an order for Google, LLC (“Google”) to show cause for why it should not be sanctioned for discovery misconduct. This Request is based on the attached Memorandum of Points and Authorities, the Declaration of Mark C. Mao and exhibits attached thereto, the pleadings and other papers on file in this action, any oral argument, and any other evidence that the Court may consider.

ISSUE PRESENTED

Whether the Court should order Google to show cause for why it should not be sanctioned for discovery misconduct for (1) concealing its logging of a “maybe_chrome_incognito” to detect, monitor, and analyze Chrome Incognito traffic from putative class members, from Plaintiffs, the Special Master, and the Court; and (2) violating the Court’s November 12, 2021 Order.

RELIEF REQUESTED

Pursuant to this Request, and Plaintiffs’ October 14, 2021 Rule 37(b) Motion, Plaintiffs respectfully ask the Court to set an evidentiary hearing and order Google to show cause for why it should not be sanctioned for discovery misconduct, including by:

1. Taking as established for purposes of the action that (A) Google can detect event-level Incognito traffic within its logs, (B) this Incognito data is linkable to users, so that (C) the class is ascertainable.
2. Instructing the jury that “Google concealed and altered evidence regarding its ability to identify Incognito traffic.”
3. Requiring Google to reimburse Plaintiffs for all fees that have been paid and will be paid to Special Master Brush.

Plaintiffs also ask that the Court order Google employees Chris Liao and Bert Leung to appear at the evidentiary hearing, as well as the Google declarant who swore to the Court that Google complied with the November 12 Order (Dkt. 338).

1
2 Dated: February 26, 2022

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INTRODUCTION

On September 2, 2020, Google told the Court that “it is unclear how Plaintiffs could ascertain the members of the proposed class” (including people who used Chrome Incognito). Dkt. 59 at 8. Ever since, Google has concealed from Plaintiffs, the Court, and the Special Master that Google implemented a tool to do just that for its own business purposes. Google produced 283 of Bert Leung’s documents on Friday, February 18, 2022—two weeks before the close of discovery and months into the Special Master process. Those documents’ revelations are stunning:

- Since June 2020, Mr. Leung and Mandy Liu have worked on a project to [REDACTED] [REDACTED] Ex. 1 GOOG-BRWN-00845639 at -40;
- As part of that effort, Mr. Leung suggested [REDACTED] in June 2020 (*id.*), and he and Ms. Liu decided to call this field a “*maybe_chrome_incognito*” bit in October 2020 (after this case was filed). Ex. 2, GOOG-BRWN-00845596;
- Google *actually began logging* the proposed “*maybe_chrome_incognito*” [REDACTED] [REDACTED] Ex. 3, GOOG-BRWN-00845423.

As part of the Special Master process to provide “Plaintiffs the tools to identify class members using Google’s data,” the Court ordered Google to submit a sworn declaration that “to the best of its knowledge, Google has provided a complete list of data sources that contain information relevant to Plaintiffs’ claims.” Dkt. 331, Ex. 1 ¶ 1. On November 18, 2021, Google falsely certified that it had done so—when, in fact, it failed to disclose [REDACTED] logs that apparently contain the “*maybe_chrome_incognito*” field. *Compare* Dkt. 338-1 (list of data sources disclosed by Google), *with* Ex. 3, GOOG-BRWN-00845423. And for a log Google did disclose, Google altered evidence by *deleting the “maybe_chrome_incognito” field from the schema* before producing it to the Special Master and Plaintiffs. As a result, Plaintiffs and the Special Master had *no idea the “maybe_chrome_incognito” field existed.*

1 This was the culmination of Google’s concealment, not its inception. To throw Plaintiffs
2 off the scent from the very start, Google failed to disclose Bert Leung and Mandy Liu in a list of
3 200+ persons with knowledge and potential document custodians Google provided Plaintiffs on
4 February 4, 2021. Ex. 4, GOOG-BRWN-00023909. Google again failed to disclose Mr. Leung or
5 Ms. Liu in its March 29, 2021, response to Plaintiffs’ Interrogatory asking Google to identify
6 employees with knowledge about “Google’s collection and use of data in connection with users’
7 activity while in a private browsing mode.” Exs. 5, 6. These omissions were inexcusable, given
8 that (a) Mr. Leung and Ms. Liu had already been working on their project to detect Incognito since
9 mid-2020 and (b) Google’s counsel have been directly communicating with Mr. Leung about this
10 case since at least February 1, 2021 (before Google produced its list of potential custodians). *See*
11 Ex. 7.

12 Without Mr. Leung’s or Ms. Liu’s documents, Plaintiffs were missing critically important
13 information concerning Google’s logging of the “maybe_chrome_incognito” field. In December
14 2021, Plaintiffs deposed Mr. Leung’s supervisor Chris Liao—and asked him about Google’s
15 efforts to study whether Incognito could be detected. Mr. Liao falsely testified that any Google
16 project to detect Chrome Incognito had been abandoned and Google did not “go on to build any
17 dedicated signals afterwards either.” Ex. 8, Liao Tr. 134:7-10. Google did not correct those false
18 statements, either informally or through Mr. Liao’s January 6, 2022, errata to his deposition
19 transcript.

20 But Google not only deceived Plaintiffs—it deceived the Court and the Court’s appointed
21 Special Master. During the entire period that Google was concealing Mr. Leung’s development
22 and implementation of the “maybe_chrome_incognito” bit, Google made multiple misleading
23 statements to the Court and the Special Master concerning its ability to detect Incognito, its data
24 production, and the supposed “burdens” it claims to have faced throughout the discovery process.

25 And Google almost got away with it. But for this Court’s recent ruling on Plaintiffs’ motion
26 to compel documents from Mr. Leung, Google might have crossed the discovery finish line before
27

1 their misconduct caught up to them. That document production made just two weeks before the
2 close of discovery revealed, for the first time, that Mr. Leung did not just analyze Incognito
3 detection (as a handful of previously produced documents had implied). In fact, Mr. Leung figured
4 it out, developing and implementing a “maybe_chrome_incognito” detection tool within specific
5 Google logs. These belatedly produced documents led to an avalanche of further discoveries in the
6 past week, confirming the lengths to which Google went to conceal the
7 “maybe_chrome_incognito” field from Plaintiffs, the Special Master, and the Court.

8 Google’s actions simply cannot be reconciled with its obligations to conduct discovery in
9 good faith, tell the truth under oath, and comply with Court orders. Google’s conduct cannot be
10 chalked up to a mere discovery dispute. Without appropriate sanctions—ones with teeth—Google
11 has not been, and will not be, deterred. Google’s attitude appears to be that it has nothing to lose
12 and everything to gain: Absent real sanctions, it can hide the ball and either (a) get away with it or
13 (b) when caught, simply produce what it should have provided earlier. And monetary sanctions,
14 while certainly warranted, do not suffice. Google generates hundreds of billions of dollars in
15 revenue per year and monetary sanctions are simply immaterial to Google’s bottom line.
16 Moreover, discovery is coming to a close and Plaintiffs have been prejudiced, having taken
17 numerous depositions and engaged in a many-months-long Special Master process, all while
18 Google withheld the truth and plainly relevant data in violation of a Court order.

19 Plaintiffs respectfully ask the Court to reinstate Plaintiffs’ October 14, 2021, Rule 37(b)
20 Motion and order Google to show cause why it should not be sanctioned in connection with that
21 motion and this one. Appropriate sanctions may include but are not limited to:

- 22 1. Taking as established for purposes of the action that (A) Google can detect
23 event-level Incognito traffic within its logs, (B) this Incognito data is linkable
24 to users, so that (C) the class is ascertainable.
- 25 2. Instructing the jury that “Google concealed and altered evidence regarding its
26 ability to identify Incognito traffic.”
- 27 3. Requiring Google to reimburse Plaintiffs for all fees that have been paid and
28 will be paid to Special Master Brush.

Plaintiffs also submit that an evidentiary hearing is warranted to hear testimony from (1) Mr. Leung (whose deposition Google unilaterally rescheduled to the last day of fact discovery, after Plaintiffs began raising questions concerning the content of his recently-produced documents); (2) Mr. Liao (who gave false testimony concerning Google's Incognito detection); and (3) Google's Court-ordered declarant (who it appears falsely certified that Google had complied with the Court's order to provide a "complete list of data sources that contain information relevant to Plaintiffs' claims").

BACKGROUND

I. Plaintiffs Uncover the Scope of Google's Misconduct

A. Two Weeks Before the Close of Fact Discovery, Plaintiffs Learn that Google Implemented an Incognito Detection Tool Within Google Logs.

On September 2, 2020, Google told the Court that "it is unclear how Plaintiffs could ascertain the members of the proposed class" (i.e., people who used a private browsing mode, including Chrome Incognito). Dkt. 59 at 8. Since then, Plaintiffs have diligently sought discovery to refute Google's assertion.

Eighteen months later, in a February 18, 2022 production, following Plaintiffs' motion to compel documents from Bert Leung (see Dkt. 401), Plaintiffs for the first time learned that internal Google logs and data sources now contain a field dedicated to identifying and tracking Incognito traffic. The name of the field is "*maybe-chrome-incognito*":

- | |
|---|
| <ul style="list-style-type: none"> • Bert Leung, 2021-09-13 14:58:47
are we already logging maybe-chrome-incognito in search [REDACTED] ready? • Mandy Liu, 2021-09-13 14:58:54
yes |
|---|

Ex. 9, GOOG-BRWN-00845312 at -18. Prior to this production, Mr. Leung's supervisor, Chris Liao, testified that projects to identify and track Incognito traffic had been discontinued for alleged lack of accuracy. Ex. 8, Liao Tr. 134:7-10. ("We did not, to my best knowledge, go on to build any dedicated signals afterwards either.").

Documents from Google’s February 18 production show that in 2021 Mr. Leung and Ms. Liu finalized and implemented an Incognito-detection tool for both Google “Search” logs (as noted in the above document) as well as “Display” logs, i.e., logs that store data about users’ visits to non-Google websites. Ex. 10, GOOG-BRWN-00845569 at -69. Because Google had represented in the Liao deposition that such projects had been abandoned, Plaintiffs had no idea that Google implemented this Incognito-detection tool until Google produced documents for the first time just two weeks before the upcoming March 4 close of fact discovery.

Google developed this “maybe_chrome_incognito” tool by relying on something called the “X-Client Data Header.” The absence of the “X-Client Data Header” is the “proxy” for detecting Incognito traffic within these logs. Ex. 11, GOOG-BRWN-00845277. Notably, Google has consistently represented to Plaintiffs, the Special Master, and the Court that the absence of the X-Client Data Header cannot be used to detect Incognito use. *E.g.*, Dkt. 140 at 5, Dkt. 218 at 6.

While Google was repeatedly representing to this Court that private browsing users cannot be identified, Mr. Leung and Ms. Liu were in fact developing (and eventually implemented) a tool designed to do precisely that—detect Incognito traffic within Google logs. Apparently, Google needed such tools so that it can measure and attempt to [REDACTED] as a result of a new feature for its Incognito mode that blocks third-party cookies, in addition to a stronger pro-privacy environment that disfavors third-party cookies. Ex. 12, GOOG-CABR-05144884 at -933. In essence, when a business purpose arises, Google can readily develop tools to detect Incognito traffic, but when it comes to this litigation, Google tells the Court it cannot be done.

B. Google Admits That It Removed This Incognito Detection Field from a Log Produced to Special Master Brush, and that Google Withheld Other Logs With the Incognito Detection Field

As discovery progressed, Google graduated from concealing evidence to altering evidence. After finally learning that Google had implemented Mr. Leung’s and Ms. Liu’s “maybe_chrome_incognito” detection tool within specific logs, Plaintiffs promptly asked Google

1 to clarify whether all such logs had already been identified and produced within the Special Master
2 process, in accordance with this Court's November 12 Order, Dkt. 331.

3 During a February 23, 2022, meet-and-confer supervised by Special Master Brush, counsel
4 for Google admitted that Google had only produced schema for [REDACTED] log while
5 withholding other logs entirely. Mao Decl. ¶ 26. And later that night, counsel admitted that *the*
6 *"maybe_chrome_incognito" field had been entirely removed from this schema prior to its*
7 *production*. Ex. 20. Let us be clear: prior to producing this log to Plaintiffs, Google removed from
8 it all traces of a field dedicated to detecting Incognito traffic, a field which could identify class
9 members. Google poisoned the Special Master process from the start.

10 Google claims that it did not include this critical Incognito detection within the schema
11 produced because this field may not fall within "the largest 100 fields" of a given log—an absurd
12 position. The Court's November 12 Order required that Google identify *all* relevant logs and
13 produce *all* schema and fields, and Google and its counsel understood the purpose of this entire
14 process. There was and is no excuse for removing a field named "incognito." To the extent Google
15 decided it was necessary to cull the information for some reason (even though this would be
16 contrary to the November 12 Order), surely Google realized that *"maybe_chrome_incognito"*
17 should not have been among the withheld fields.

18 Furthermore, Plaintiffs still have barely any insight into what *other* logs contain the
19 Incognito detection field that *still* have not been disclosed. On Friday, February 18, 2022, Google
20 produced for the first time a May 18, 2021 document approving logging the
21 "maybe_chrome_incognito" bit in certain logs (and stating there were [REDACTED] logs not listed).
22 Ex. 3, GOOG-BRWN-00845423 at -24. Many of the listed logs do not appear to have been
23 included in Google's Court-ordered declaration that it had identified all relevant sources. Dkt. 338-
24 1. During the February 23 meet-and-confer, Google refused to clarify how many other logs contain
25 this field. Mao Decl. ¶ 26. Plaintiffs repeatedly asked but, rather than answer, Google told Plaintiffs
26 to ask Mr. Leung during his upcoming deposition. *Id.* But while Mr. Leung's deposition had been
27

1 scheduled for February 25 pursuant to written agreement by the parties, as soon as Plaintiffs began
 2 asking questions arising from Mr. Leung's documents, Google unilaterally and without
 3 explanation re-set the deposition for March 4, the last day of discovery. Mao Decl. ¶ 25. Google
 4 claimed it was necessary to reschedule Mr. Leung's February 25, 2021 deposition because he had
 5 a sudden "conflict" arise—but then refused to say what the supposed conflict was in response to
 6 multiple demands from Plaintiffs. *Id.*

7 Google's misconduct has undermined the Special Master process. Had the schema for the
 8 log with the Incognito field been produced without any alteration, Plaintiffs would have discovered
 9 the Incognito detection field months ago. Plaintiffs did not even choose this log for Iterative Search
 10 1 because Plaintiffs had no idea that Google had actually implemented an Incognito detection field.
 11 Moreover, Plaintiffs and the Special Master would have had sufficient time to navigate the
 12 identification and production of all such logs (assuming *arguendo* that Google not only provided
 13 the field, but the other logs that also contain this field as well). Instead, discovery is about to close
 14 and Plaintiffs do not have a single log entry of their data that includes the Incognito detection field.

15 **II. 18 Months of Obstruction**

16 **A. In Late 2020, Google Claims that It Has No Documents to Help Identify Class** 17 **Members; Meanwhile Bert Leung Has Already Begun Working to Detect** 18 **Incognito Traffic Within Google Logs**

19 The above lays out where Google's concealment ended. But it is also important to
 20 understand just how far back it began. Google's deception began on September 30, 2020, after
 21 Plaintiffs served RFP 10, seeking, "Documents sufficient to identify all alleged class members,
 22 including all electronic or physical address information associated with alleged class members."
 23 Ex. 13 at 13. Google refused to produce any documents, claiming that "Google does not maintain
 24 documents or data in the ordinary course of business that would allow it to 'identify all alleged
 25 class members'" and that the "identity of 'alleged class members' . . . is not ascertainable." *Id.*

26 Yet three months earlier, in June 2020, Mr. Leung had already begun working on the
 27 project that would culminate in the development and implementation of the

1 “maybe_chrome_incognito” field. On June 9, 2020 (a week after this case was filed), Mr. Leung
 2 submitted a proposal about his idea to [REDACTED]
 3 [REDACTED] Ex. 1, GOOG-BRWN-00845639
 4 at -40. This project was important because Google had recently begun [REDACTED]
 5 [REDACTED]
 6 [REDACTED] See Ex. 14, GOOG-CABR-
 7 04324934 at -35 (discussing project [REDACTED]
 8 [REDACTED]); see also Dkt. 395 at 13-14, 16-17
 9 (summarizing this financial analysis). Within his June 9 proposal, Mr. Leung flagged the “potential
 10 privacy risk of logging inferred Chrome Incognito detection,” and Mr. Leung sought “feedback
 11 from privacy gurus” about his concern. Ex. 1. In October, after this lawsuit was filed, Mr. Leung
 12 and Ms. Liu named their tool: “maybe_chrome_incognito.” Ex. 2. GOOG-BRWN-00845596.

13 Google did not provide any information about these efforts to Plaintiffs at that time.

14 **B. In 2021, Google Hides Mr. Leung and His Significant Progress from Plaintiffs**
 15 **and the Court**

16 Plaintiffs persisted in seeking discovery for purposes of class identification. To identify
 17 document custodians, Plaintiffs asked for a list of employees with information about the case.
 18 Google provided that list on February 4, 2021, and it included over 200 employees. Ex. 4, GOOG-
 19 BRWN-00023909. *The list did not include Mr. Leung or Ms. Liu*, who had already set out on a
 20 project to develop a “maybe_chrome_incognito” field. Ex. 2, GOOG-BRWN-00845596.

21 Google surely knew that Mr. Leung and Ms. Liu had relevant information. So did Google’s
 22 outside counsel. During the same time period (and perhaps long before), Google’s counsel was
 23 communicating with Mr. Leung about the case. Ex. 7. And while they remained in touch, Google
 24 neglected to identify either Mr. Leung or Ms. Liu in a March 29, 2021 response to an Interrogatory
 25 asking Google to identify employees with knowledge about “Google’s collection and use of data
 26 in connection with users’ activity while in a private browsing mode.” Exs. 5, 6.

1 Plaintiffs also sought to address deficiencies with Google’s preservation efforts. On March
 2 23, the parties filed a joint letter brief regarding Google’s refusal to suspend its routine deletion
 3 periods for any logs. Dkt. 119. Google told the Court that Plaintiffs’ demand would require Google
 4 to preserve any log in which private browsing data might have been stored, and on that basis
 5 characterized “Plaintiffs’ preservation demand [a]s extraordinarily burdensome [and] not
 6 feasible.” Dkt. 119 at 3. Ultimately, “[b]ased upon the facts currently before the Court” and
 7 “without prejudice to Plaintiffs’ ability to raise a challenge based upon new evidence not currently
 8 before the Court,” this Court granted Google a Protective Order. *Calhoun v. Google*, 5:20-cv-
 9 05146 (N.D. Cal.) at Dkt. 174 (adopted by reference in Dkt. 147-1 at 1). Plaintiffs briefed this
 10 preservation dispute, and this Court issued a ruling, without knowing about the progress that Mr.
 11 Leung and Ms. Liu were making in their efforts to detect, log, and preserve Incognito traffic.

12 For example, on April 14, two weeks before this Court’s ruling, Mr. Leung and Ms. Liu
 13 sought advice from colleagues regarding their efforts. Ms. Liu wrote:

14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 Ex. 15, GOOG-BRWN-00845477 at -77. [REDACTED]
 18 [REDACTED] Ex. 16, GOOG-BRWN-00845481,
 19 at -81. Ms. Liu replied: [REDACTED]
 20 [REDACTED] Ex. 15.

21 By contrast, Google in this case never proposed to [REDACTED]
 22 [REDACTED] *Id.* [REDACTED]
 23 [REDACTED] Nor did Google disclose to Plaintiffs that Mr. Leung and Ms.
 24 Liu were developing a “maybe_chrome_incognito” detection tool for particular logs. Had Google
 25 done so, the parties could have easily reached a compromise in which Google would preserve a
 26 far more limited set of data, namely, only the necessary parts of the particular logs in which the
 27 “maybe_chrome_incognito” field would live.

Google's obstruction likewise infected the parties' dispute over RFP 10, which sought "Documents sufficient to identify all alleged class members." In their April 23, 2021 motion to compel, Plaintiffs, as a compromise, proposed focusing on data from logs containing the "X-Client-Data Header" field, and, specifically, data where this "X-Client Data Header" is missing:

At the 30(b)(6) deposition in this case, Google's representative confirmed that when a user is engaged in Incognito mode, the "X-Client Data header" is not sent to Google. Google also admits that it maintains raw referrer header logs containing X-Client Data Header fields. ***Class members may be ascertained by looking for entries without the X-Client Data header.***

Dkt. 140 at 4 (emphasis added). Plaintiffs thus proposed doing what Bert Leung was simultaneously doing, as Mr. Leung's "maybe_chrome_incognito" bit is logged when the X-Client Data Header is absent (and certain other criteria are also satisfied). *See* Ex. 11.

In opposition, Google told the Court that Plaintiffs' proposal was "unworkable" since "the absence of the header cannot be used to ascertain purported class members as it would improperly include all users browsing on a non-Chrome browser." Dkt. 140 at 5. And during the ensuing April 29 discovery hearing, counsel for Google doubled down on those assertions, going so far as to accuse Plaintiffs' counsel of "speculation":

- [W]e felt like there's quite a lot of speculation on behalf of [Plaintiffs' counsel] and we wanted to explain to you that this is actually not something that we just have or can quickly query, nor do we think their proposed path is one that will lead to that outcome. Apr. 29 Tr. at 20:1-6.
- [W]e do not have the information to identify the plaintiffs' private browsing sessions. I know [Plaintiffs' counsel] doesn't like that, but that is the reality. Apr. 29 Tr. at 24:1-13.

As with the preservation dispute, Google did not inform Plaintiffs (or the Court) about Mr. Leung's and Ms. Liu's efforts.

The Court rejected Google's arguments, holding that Plaintiffs were entitled to test Google's say-so about the data through discovery:

Well, but what the Plaintiffs are asking for is pieces of information from different places because they want to see if they can piece together, by combination of that information, class members. And that's why – I mean,

it seems to me that they have a right to try to do that with whatever information you have.

Apr. 29 Tr. at 19:2-7 (emphasis added). The Court then ordered Google to produce all “authenticated” and “unauthenticated” data relating to the named Plaintiffs. Dkt 147-1 at 2.

Meanwhile, Mr. Leung and Ms. Liu continued making significant progress. In a May 10, 2021 conversation (produced for the first time on February 18, 2022), Mr. Leung told Ms. Liu that the “maybe_chrome_incognito” detection tool is “sensitive”—“not from a privacy perspective, but from a legal (competition) perspective.” Ex. 17, GOOG-BRWN-00845437.¹ By that point, Google was apparently no longer concerned that tracking Incognito within its logs raised any “privacy” concerns. Google was instead worried about the “legal” implications, i.e., for lawsuits like this one. Yet Google still did not disclose Mr. Leung or Ms. Liu or their work to Plaintiffs.

In July 2021, Plaintiffs moved to compel responses to RFP 120, which sought “[d]ocuments sufficient to identify, during the Class Period, Chrome web browser communications that did not contain any X-Client-Data-Header.” Dkt. 218 at 3. Plaintiffs sought this information to “identify class members and determine what data Google collected (and continues to collect) from their private browsing activities, using the empty X-Client-Data header field as the starting point.” *Id.* In opposition, Google complained that producing the information sought would be “burdensome and not proportional because Google would have to produce records (including confidential business information related to fields collected) that have nothing to do with the claims at issue here.” *Id.* at 9.

Once again, Google did not inform the Court or Plaintiffs that Google was already (or at least on the cusp of) implementing the “maybe_chrome_incognito” detection field within specific Google logs and that the absence of the X-Client-Data Header was one of the criteria for logging that field.

¹ Part of the document is not visible because of how Google produced it. Plaintiffs used the metadata to complete this quote.

Had Google been forthcoming, the parties could have reached a compromise where Google would only produce data from the specific logs that contain the “maybe_chrome_incognito” detection tool. Google instead once again misrepresented its burden, pretending that it would need to produce every piece of data that lacked an X-Client Data Header. Because of Google’s misrepresentations, Plaintiffs’ motion was denied (after being referred to the Special Master). *See* Dkt. 331.

C. Google Undermines the Special Master Process

Google’s misconduct culminated in its violation of the Court’s orders governing the Special Master process. In October 2021, Plaintiffs filed a Rule 37(b) motion because Google was withholding data on the basis of its say-so about the data’s relevance. *See* Dkt. 292 at 6-12 (summarizing the data that Google was refusing to produce). In their motion, Plaintiffs asked the Court to order Google to comply with the April 30 Order or, alternatively, prohibit Google from making arguments about any data it refused to produce. *Id.* at 15-19. Special Master Brush informed the Court of his plan to issue a Report and Recommendation regarding certain disputes, and the Court stayed further briefing on Plaintiffs’ Rule 37(b) motion “pending resolution of the issues set forth in the forthcoming Report and Recommendation.” Dkt. 297.

Special Master Brush’s Report validated Plaintiffs’ concerns. He found as “fact” that the named Plaintiffs’ data has “not yet been fully produced.” Dkt. 299 ¶ 53. And this Court, on *de novo* review, upheld his factual finding:

[T]he Court finds that the Special Master’s factual conclusions regarding the deficiencies in Google’s production of information about searches conducted to date as well as production of Plaintiffs and putative class data . . . are well founded and adopts those findings. As previously noted by this Court, Google knows what data it has collected regarding Plaintiffs and putative class members and where the data may be found, therefore Google must produce the information and data as directed herein.

Dkt. 331 at 3.

To remedy the problem, Google was ordered to conduct an additional four rounds of iterative searches for the named Plaintiffs’ data—in effect, Google got another chance to play by the rules. Plaintiffs would select from among data sources that Google had already identified and

1 then propose search strings, and Google would produce the data that hit on those strings. Dt. 331,
 2 Ex. 1. The Court also found that any burden concerns were Google's own fault:

3 To the extent [this process] requires the significant commitment of time, effort, and
 4 resources across groups of engineers at Google on very short timelines, that burden . . .
 5 arises, at least in part, as a result of Google's reticence thus far to provide critical data
 6 source information in these actions.

7 *Id.* at 4-5.

8 To address Plaintiffs' concern about Google's failure to identify necessary logs, Google
 9 was also required to "provide a declaration, under penalty of perjury from Google, not counsel,
 10 that . . . [t]o the best of its knowledge, Google has provided a complete list of data sources that
 11 contain information relevant to Plaintiffs' claims." *Id.* Ex. 1 ¶ 1. A Google Discovery Manager
 12 provided that declaration on November 18, swearing that "To the best of my knowledge and
 13 informed understanding, Google has provided a complete list of sources that contain information
 14 about Plaintiffs relevant to Plaintiffs' claims." Dkt. 338. ¶ 3.

15 This statement, in light of Mr. Leung's recently produced documents, appears to be false.
 16 Documents Google produced on February 18, 2022 appear to demonstrate that
 17 "maybe_chrome_incognito" was approved for use in multiple logs that had not been disclosed in
 18 Google's Court-ordered declaration. Ex. 3, GOOG-BRWN-00845423. Moreover, even for the logs
 19 that Google *did* disclose, Google did not reveal to Plaintiffs or the Special Master that they
 20 contained a "maybe_chrome_incognito" field. Worse yet, for the only log schema Plaintiffs
 21 received that actually contains this field, *Google removed any trace of the field prior to its*
 22 *production*. And Google still hasn't told Plaintiffs which other logs contain this field that have not
 23 yet been identified and produced. Mao Decl. ¶ 26. Google likewise removed the schema the [REDACTED]
 24 fields that Mr. Leung and Ms. Liu were using in conjunction with the "maybe_chrome_incognito"
 25 field. *Id.*; *see also* Ex. 3, GOOG-BRWN-00845423.

26 Google's obstruction has made a mockery of the whole Special Master process. In the
 27 Court's words, this process was intended to, among other things, "***provide the Brown . . . Plaintiffs***
 28 ***the tools to identify class members using Google's data.***" Dkt. 331 at 4 (emphasis added). Yet

Google is still withholding from Plaintiffs the precise logs and fields that Google itself has been using to identify Incognito traffic during the discovery period. Google has wasted the Court's time, the Special Master's time, and Plaintiffs' time.

D. With the Court's Help, Plaintiffs Finally Discover the Truth

On Thanksgiving Eve 2021 (long after Google's early October document production deadline), Google produced a document that finally set Plaintiffs on the path to uncovering Google's misconduct. The document was a July 2020 email from Bert Leung discussing a [REDACTED]

[REDACTED] Ex. 18, GOOG-CABR-05280756. Plaintiffs now understand this July 2020 [REDACTED] as the beginning of Mr. Leung's efforts to build the "maybe_chrome_incognito" field.

Plaintiffs were alarmed to realize that one of logs that Mr. Leung was studying, the [REDACTED], had not yet been disclosed. Plaintiffs promptly brought this missing log to the Special Master, and after reviewing the documents, he directed Google to produce the log schema for the log and to run searches of the log. Mao Decl. ¶ 28. Special Master Brush thus overruled Google's objection that the log was irrelevant insofar as it was a "Search" log. From that point forward, Google was indisputably on notice that it could not withhold logs on the basis of the log being a "Search" log, particularly any log that Mr. Leung studied for his analysis, let alone a log in which Mr. Leung actually implemented the Incognito detection field.

Google has since then refused to tell Plaintiffs which other logs Mr. Leung evaluated in the early stages of his "log analysis of Chrome Incognito." After Special Master Brush overruled Google's objection on the [REDACTED] Plaintiffs asked Google whether any other logs that Mr. Leung studied had been withheld. Mao Decl. ¶ 29. Counsel for Google never responded to Plaintiffs' multiple requests. *Id.*

Plaintiffs then propounded an interrogatory asking Google to "identify *every* log and data source that Google reviewed, analyzed, or searched as part of Google's efforts to conduct a 'log analysis of Chrome Incognito' in and around mid-2020. *See, e.g.,* GOOG-CABR-05280756," Ex.

19 (emphasis added). Google did not answer that question, either. Google instead evaded it by merely quoting back *one* of the logs that was already mentioned in the email that Plaintiffs cited. *See id.* (“Google used [REDACTED] in the analysis of Ad Manager browsing traffic described in GOOG-CABR-05280756.”). That evasion is improper. Google has subsequently clarified in meet-and-confers that Mr. Leung’s analysis was not limited to the logs mentioned in this one document, and yet Plaintiffs still do not have a complete list of every data source that Mr. Leung studied, much less a complete list of the logs in which “maybe_chrome_incognito” field has officially been implemented. Mao Decl. ¶ 30.

The Thanksgiving Eve production also clarified for Plaintiffs that Mr. Leung was an important witness for this case, so Plaintiffs asked Google to produce custodial documents from his files. Google objected, principally contending that Plaintiffs could not show “good cause” to add another custodian above the limit the Court had previously set. Dkt. 399 (joint letter brief). Plaintiffs countered by arguing that Google had never disclosed Mr. Leung as a potential custodian with relevant information and likewise delayed in producing documents about his role in the Incognito detection analysis. *Id.*

Meanwhile, on December 2, Chris Liao, Mr. Leung’s immediate supervisor, testified that Google had abandoned any efforts to identify Incognito traffic within its logs. Plaintiffs asked Mr. Liao whether “amongst these privacy signals, is there one for incognito mode browsing on Chrome?” Ex. 8, Liao Tr. 131:14-16. Mr. Liao answered, “No.” *Id.* He went on to elaborate for minutes, never once mentioning the creation and implementation of the “maybe_chrome_incognito” field, which had been introduced in certain logs by no later than September. Ex. 9, GOOG-BRWN-00845312 at -18.

- [T]here was discussion around proxy signals that we can sue to approximate incognito traffic. However, we were not able to identify any definitive or reliable signal to identify incognito mode in the end. Ex. 8, Liao Tr. 133:23-134:3.
- [I]t was determined that there was no reliable way to technically detect incognito in a definitive and reliable and accurate manner. And as a result, ***no further action was taken to build such a hypothetical signal.*** *Id.* 134:15-20 (emphasis added).

- As I stated before, we do not have a reliable *signal to infer incognito* mode at this time we receive an ad query. *Id.* 140:6-10 (emphasis added).

These statements were misleading, at best. Google had already implemented a specific field within Google logs to detect Incognito. Whether Mr. Liao would now contend that signal is 100% accurate is of no moment. Google deemed the signal accurate enough to roll it out for its own use, and Plaintiffs are entitled to this discovery.

Google might have gotten away with concealing critical evidence but for this Court's ruling on the Bert Leung document dispute. The Court agreed with Plaintiffs, ordering Google to provide hit counts for the search terms that Plaintiffs requested and to then meet-and-confer to resolve the dispute. Dkt. 401. It turns out that Plaintiffs' proposal hit on just 982 documents, and Google shortly thereafter made a production from Mr. Leung's custodial files. Mao Decl. ¶ 5. That February 18, 2022 production revealed to Plaintiffs, for the first time, that Google had actually implemented a field within particular logs called "maybe-chrome-incognito." Ex. 9, GOOG-BRWN-00845312 at -18 (Leung: "are we already logging maybe-chrome-incognito in search [REDACTED] already?" Liu: "yes"). And days later, Plaintiffs learned, again for the first time, that (a) Google had removed this field from a log schema produced to Plaintiffs and (b) continued to withhold in their entirety *other* logs with the field.² In light of all of these revelations, Plaintiffs are seeking additional discovery from Google relating to this field. *See* Dkt. 424 at P22.

But regardless of whether Plaintiffs obtain additional discovery, Google's persistent efforts over 18 months to obstruct discovery and conceal its implementation of an Incognito detection tool should not be countenanced. Google must be held accountable for its misconduct.

² Google might point out in opposition that it produced a tiny number of documents alluding to the possibility of developing a "maybe_chrome_incognito" field prior to the February 18, 2022 production. *See generally* Mao Decl. (summarizing the earlier productions). None of those documents showed that Google actually implemented the field in Google logs; they at most reflected the idea of creating such a field. And Plaintiffs had no reason to believe this field had been actually implemented, particularly when Google (1) removed the field from a log schema it produced, and (2) a Google witness testified that Google did not in fact implement any Incognito detection signal.

ARGUMENT

I. Legal Standard

Under Rule 37(b)(2)(A), when a party fails to comply with a discovery order, a court may impose “whatever sanctions are just . . . up to dismissal of part or all of the party’s claims.” *Sanchez v. Rodriguez*, 298 F.R.D. 460, 463 (C.D. Cal. 2014). Such remedies may include but are not limited to establishing facts in favor of the moving party, prohibiting the party in violation from supporting designated claims or introducing designated matters in evidence, imposing monetary sanctions in the form of reasonable expenses caused by the failure to obey, treating this failure as contempt and staying the proceedings until the order is obeyed. *See* Fed. R. Civ. P. 37(b)(2). In the context of Rule 37(b) sanctions, the court reads the term “order” in Rule 37(a) “broadly.” *Sali v. Corona Reg’l Med. Ctr.*, 884 F.3d 1218, 1222 (9th Cir. 2018). A “district court has great latitude in imposing sanctions for discovery abuse.” *Dahl v. City of Huntington Beach*, 84 F.3d 363, 367 (9th Cir. 1996).

In addition, “discovery misconduct may be punished under the court’s ‘inherent powers’ to manage its affairs.” *Guifu Li v. A Perfect Day Franchise, Inc.*, 281 F.R.D. 373, 396 (N.D. Cal. 2012) (quoting *Unigard Sec. Ins. Co. v. Lakewood Eng. Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992)); *see also Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001) (district courts have inherent power to levy sanctions for “bad faith or conduct tantamount to bad faith,” including recklessness combined with “frivolousness, harassment, or an improper purpose.”).

II. Google Violated the November 12 Order, and Abused the Discovery Process Throughout this Case

Google violated the November 12 Order by (1) withholding the “maybe_chrome_incognito” field from Plaintiffs, and (2) representing to the Court that it had identified all relevant sources to Plaintiffs. The November 12 Order required Google to “provide a declaration, under penalty of perjury from Google, not counsel, that . . . [t]o the best of its knowledge, Google has provided a complete list of data sources that contain information relevant

1 to Plaintiffs' claims." *Id.* Ex. 1 ¶ 1. A Google Discovery Manager provided that declaration on
2 November 18. Dkt. 338. ¶ 3.

3 In fact, Google altered one of the log schemas it produced to Plaintiffs by removing the
4 "maybe_chrome_incognito" field from the log, and Google continues to withhold a still-
5 unspecified number of other logs that contain this same Incognito detection field, including logs
6 that contain so-called "unauthenticated" data. There is no excuse for these plain-as-day violations
7 of this Court's order, particularly when Google knows that the purpose of this process is to
8 "***provide the Brown . . . Plaintiffs the tools to identify class members using Google's data.***" Dkt.
9 331 at 4 (emphasis added).

10 Plaintiffs expect Google to argue that some of the withheld logs did not have to be produced
11 because those logs contain "Search" data or "authenticated" data. But the whole point of the
12 Special Master process is to "provide the *Brown* . . . Plaintiffs the tools to identify class members
13 using Google's data." Dkt. 331 at 4. Search data is obviously such a tool. As explained in Plaintiffs'
14 portion of the 30(b)(6) letter brief, people run Google searches to visit non-Google websites. Dkt.
15 411 at 2. Therefore, the Court ordered Google to produce a witness to testify about "Google's
16 ability to identify users or devices based on their Google searches within a private browsing mode."
17 Dkt. 418-1 at 26. In any event, Google has also refused to confirm whether it withheld any logs
18 with this field that are specific to so-called "unauthenticated" data. Mao Decl. ¶¶ 26. If Google has
19 produced all "unauthenticated" data logs that contain the Incognito detection tool, then surely
20 Google would confirm as much. At bottom, in a case where Google has been disputing Plaintiffs'
21 ability to identify class members, there is simply no excuse for Google withhold from Plaintiffs
22 logs that contain the "maybe_chrome_incognito" field.

23 As a result of Google's violations, with just one week left before the close of fact
24 discovery, Plaintiffs still lack a single piece of data associated with the
25 "maybe_chrome_incognito" field. The Court and Special Master could not have envisioned this
26 outcome.

But the misconduct here goes beyond violating one or two Court Orders. Google has made a mockery of the entire course of discovery. To recap:

- Google omitted Mr. Leung and Ms. Liu from a list of over 200 employees with relevant information and likewise omitted them from an interrogatory response.
- Google briefed and prevailed in many discovery disputes, including over ESI preservation, by misrepresenting the burden associated with Plaintiffs' requests. Google could have simply followed Mr. Leung's lead and produced and preserved a tiny fraction of its data—only the data used for the "maybe_chrome_incognito" field.
- A Google witness testified that any projects to identify and track Incognito traffic had been discontinued for alleged lack of accuracy. Ex. 8, Liao Tr. 134:7-10.

III. Google Should Be Sanctioned

To remedy the severe prejudice caused by Google's misconduct, Plaintiffs respectfully seek: (A) evidentiary sanctions and jury instructions related to Google's concealment of the "maybe_chrome_incognito" field; and (B) reimbursement by Google for all fees paid by Plaintiffs' counsel to Special Master Brush.

A. Evidentiary Sanctions and Jury Instructions

If a party does "not obey[] a [d]iscovery [o]rder," Rule 37(b)(2)(A)(i) permits the court to "direct[] that the matters embraced in the order or other designated facts be taken as established for purposes of the action." *See also Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 695 (1982) (affirming sanction as "clearly appropriate" where petitioners engaged in continued delay in "obvious disregard of [court] orders").. Because Google failed to comply with the November 12 Order, the Court should "take[] as established for purposes of the action" that (1) Google can detect event-level Incognito traffic within its logs, (2) this Incognito data is linkable to users, so that (3) the class is ascertainable. Fed. R. Civ. P. 37(b)(2)(A)(i).

"Court intervention to protect Plaintiffs' ability to prove the[ir] allegations is necessary" when, as here, "[t]he withheld evidence is uniquely within the possession of the Defendants" and "there was no way for Plaintiffs to test their theory" as a result of the "documents withheld." *Guifu*, 281 F.R.D. at 39; *see also Zurich Am. Ins. Co. of Ill. v. World Priv. Sec., Inc.*, 2020 WL 8610839,

at *5 (C.D. Cal. Nov. 23, 2020) (“As a result of [defendant’s] shortcomings, the Court finds that evidentiary sanctions against it are warranted. Plaintiffs assert that there are certain factual matters at issue in [Plaintiff’s] discovery that must be established for the purposes of this action. Accordingly, the Court finds that the following matters are established for the purposes of this action . . .”). Such an adverse factual finding “merely serves as a mechanism for establishing facts that are being improperly hidden by the party resisting discovery.” *Gibson v. Chrysler Corp.*, 261 F.3d 927, 948 (9th Cir. 2001) (noting presumption that party resisting discovery “is doing so because the information sought is unfavorable to its interest.”).

Google should likewise be precluded from presenting any arguments in this case concerning whether Google can identify Incognito traffic within logs and whether that data is linkable to users. *See* Fed. R. Civ. P. 37(b)(2)(A)(ii); *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 844 (9th Cir. 1976). “Preclusionary orders ensure that a party will not be able to profit from its own failure to comply.” *Sas v. Sawabeh Info. Servs.*, 2015 WL 12711646, at *9 (C.D. Cal. Feb. 6, 2015) (quoting *United States v. Sumitomo Marine & Fire Ins. Co., Ltd.*, 617 F.2d 1365, 1369 (9th Cir. 1980)). “[I]t is entirely reasonable to sanction [Google’s] defiance of the [November 12] Order by precluding [it] from presenting evidence on [issues for which Google] ha[s] not provided timely and complete discovery.” *Id.* “Discovery is first and foremost a way for one party to determine the evidence supporting another party’s allegations, so it can properly investigate that evidence prior to trial.” *Lanier v. San Joaquin Valley Offs. Ass’n*, 2016 WL 4764669, at *8 (E.D. Cal. Sept. 12, 2016). Google “has thwarted [Plaintiffs’] efforts to understand the basis of” Google’s class identification arguments, so it is “appropriate, based on these failures, to preclude [Google] from introducing further facts or evidence in response to these issues.” *Id.* Otherwise, Google will benefit from any evidentiary gaps that it has caused by refusing to comply with this Court’s November 12 Order.

Evidentiary sanctions are particularly important for Plaintiffs’ anticipated motion for class certification. In *Guifu Li v. A Perfect Day Franchise, Inc.*, 2011 WL 3895118, at *3 (N.D. Cal.

1 Aug. 29, 2011), the court granted a preclusion remedy after the defendant refused to produce a
2 corporate representative, in violation of a court order. The court agreed with Plaintiffs' concern
3 that "the information withheld from Plaintiffs could very well bear on whether or not Plaintiffs are
4 able to establish commonality of issues across the putative class." *Id.* "To remedy the prejudice
5 suffered by Plaintiffs in their class certification motion" the Court prohibited the defendant from
6 "utilizing declaration evidence . . . regarding its corporate structure or ownership in its opposition
7 to class certification/collective action." *Id.* at *4; *see also Hanni v. Am. Airlines, Inc.*, 2009 WL
8 1505286, at *5 (N.D. Cal. May 27, 2009) (ordering that plaintiffs who failed to comply with
9 discovery obligations "may not rely on any discovery provided after the close of class certification
10 discovery in support of their motion for class certification or in opposition to Defendant's motion
11 to deny class certification"); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2013 WL 4598490,
12 at *13 (N.D. Ill. Aug. 29, 2013) (granting preclusion order where defendant "engaged in a pattern
13 of stonewalling" production of databases it claimed contained evidence supporting its statutory
14 defenses against liability).

15 Google's eighteen-month-long obstruction and misconduct warrants sanctions regardless
16 of whether Google finally abides by the November 12 Order. Google has already jeopardized
17 Plaintiffs' experts' ability to "conduct the required analysis within the time limits set [by the
18 Court]." *Oracle USA, Inc. v. SAP AG*, 264 F.R.D. 541, 557 (N.D. Cal. 2009) (precluding party
19 from presenting evidence concerning alleged lost profit damages for failing to timely produce the
20 relevant data); *see also Apple Inc. v. Samsung Elecs. Co.*, 2012 WL 1595784, at *3 (N.D. Cal. May
21 4, 2012) (preclusion warranted for belated production of relevant source code because "Apple's
22 experts were left with no meaningful opportunity to comprehend this code, even as they face
23 criticism from Samsung in deposition (and assuredly at trial) that their code analysis was
24 deficient"); *Hanni*, 2009 WL 1505286, at *5 (prohibiting party from relying on evidence produced
25 after the close of class certification-related discovery when moving for class certification).

Rule 37(b)(2)(A) also “authorizes a court to issue an adverse-inference jury instruction as a remedy when ‘bad faith or gross negligence has resulted in either the spoliation of evidence or failure to turn over relevant evidence.’” *First Fin. Sec., Inc. v. Freedom Equity Grp., LLC*, 2016 WL 5870218, at *3 (N.D. Cal. Oct. 7, 2016) (quoting *Karnazes v. Cty. of San Mateo*, 2010 WL 2672003, at *2–3 (N.D. Cal. July 2, 2010) (awarding an adverse-inference jury instruction when plaintiff failed to facilitate the deposition of her treating physician))). “[T]he court does not need to find bad faith before it issues an adverse-inference instruction as a sanction.” *First Fin. Sec., Inc.*, 2016 WL 5870218, at *6 (granting adverse inference jury instruction sanctions where “gross negligence [] resulted in a failure to turn over [] native-format data”, the receipt of which would have provided “a valuable opportunity to verify the accuracy of the highly relevant facts”). Google’s decision to withhold relevant evidence of its employees’ successful efforts to identify Incognito traffic—at the same time that it represented to Plaintiffs in depositions and in the Special Master process that such evidence did not exist—surpasses gross negligence. As a remedy, Plaintiffs seek an instruction to the jury that “Google concealed and altered evidence regarding its ability to identify Incognito traffic.” Such an adverse inference instruction would limit the benefit that Google can extract from its misconduct. *See Kannan v. Apple Inc.*, 2020 WL 9048723, at *9 (N.D. Cal. Sept. 21, 2020) (ordering adverse jury instruction where party adopted a unilateral and limiting interpretation of discovery obligations, and either deleted or withheld responsive documents in sole possession he was ordered to produce).

B. Reimbursement of Fees Paid to Special Master Brush

The Federal Rules require one last sanction: Because Google violated a discovery order (three, actually), “the court *must* order [Google], the attorney[s] advising [it], or both to pay the reasonable expenses, including attorney’s fees, caused by [its] failure” to comply. Fed. R. Civ. P. 37(b)(2)(C) (emphasis added). The Court repeatedly set forth a detailed process pursuant to which Google would produce data relevant to Plaintiffs’ efforts to identify class members and quantify interceptions. In its April 30 and September 16 Orders (Dkts. 147-1, 273), the Court ordered

Google to produce the named Plaintiffs' data in a three-step process overseen by Special Master Brush. Google was ordered to finish production by October 6, 2021, Dkt. 273 at 2, but because of Google's misconduct, the Court concluded on November 12 that Plaintiffs' data had "not yet been fully produced," Dkt. 299 ¶ 53 (Special Master's Report and Recommendation); Dkt. 331 at 3 (affirming finding). In its November 12 Order, the Court gave Google a second chance and restarted the data production process. Dkt. 331 Ex. 1. But here we are again. Only this time, as we have exhaustively explained, Google is *tampering with* evidence, not just concealing it. And that evidence goes to the core purpose of the proceedings before the Special Master: detection of private browsing.

Because Google has frustrated the purpose of the proceedings before the Special Master, Plaintiffs' counsel and the class should not be made to pay for it. Google can avoid these monetary sanctions only if it shows that its violations of the Court's Orders were "substantially justified." Fed. R. Civ. P. 37(b)(2). But there is no way to justify such severe misconduct. *See HRC-Hainan Holding Co., LLC v. Yihan Hu*, 2020 WL 1643786, at *3 (N.D. Cal. Apr. 2, 2020) (violation "was not substantially justified" where the circumstances "strongly indicate[d]" bad faith); *First Fin. Sec., Inc.*, 2016 WL 5870218, at *7 (same, even though the failure to produce native version of document as ordered by the court was "consistent with technological ignorance and . . . not necessarily the result of subjective bad faith"). Plaintiffs therefore ask the Court to order Google to reimburse Plaintiffs for all fees they have paid and will pay to Special Master Brush.

CONCLUSION

Plaintiffs request that the Court issue an Order to Show Cause for why it should not enter any or all of the aforementioned sanctions and remedies for Google's discovery misconduct:

Dated: February 26, 2022

MORGAN AND MORGAN

By /s/ John A. Yanchunis

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Declaration of Mao
ISO Plaintiff's Request
for an Order to Show
Cause

Redacted Version of
Document Sought to
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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
 JEREMY DAVIS, CHRISTOPHER
 CASTILLO, and MONIQUE TRUJILLO
 individually and on behalf of all similarly
 situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

William Christopher Carmody
 (admitted *pro hac vice*)
 Shawn J. Rabin (admitted *pro hac vice*)
 Steven M. Shepard (admitted *pro hac vice*)
 Alexander Frawley (admitted *pro hac vice*)
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Case No.: 4:20-cv-03664-YGR-SVK

**DECLARATION OF MARK C. MAO IN
 SUPPORT OF PLAINTIFFS' REQUEST
 FOR AN ORDER TO SHOW CAUSE**

Referral: The Honorable Susan van Keulen

DECLARATION OF MARK C. MAO

I, Mark C. Mao, declare as follows.

1. I am a partner with the law firm of Boies Schiller Flexner LLP, counsel for Plaintiffs in this matter. I am an attorney at law duly licensed to practice before all courts of the State of California. I have personal knowledge of the matters set forth herein and am competent to testify.

2. I submit this Declaration in support of Plaintiffs' Request for the Court to issue an Order to Show Cause for Why Google Should Not Be Sanctioned for Discovery Misconduct.

3. On January 31, 2022, Google produced for the first time a document titled "Detect 3P Cookies Blocking Browsers" that was "last updated: 05/05/2021." Ex. 21, GOOG-CABR-05757329.

4. This document, for the first time, indicated to Plaintiffs that Google submitted to its [REDACTED] or [REDACTED] team a plan to change Google's logging practices to log a "maybe_chrome_incognito" field in approximately [REDACTED] logs called [REDACTED] logs. Google did so to support a Dashboard tool to monitor and analyze traffic from browsers that block third-party cookies, including Chrome Incognito, and assess their revenue impact on Google. Plaintiffs promptly followed up with Google and demanded further information on the Dashboard referenced in that document. Ex. 21, GOOG-CABR-05757329 at -31-32.

5. On February 18, 2022, Google produced approximately 283 documents from Bert Leung's custodial files. This production followed a ruling from the Court directing Google to tell Plaintiffs the "hit counts" for Mr. Leung's documents. Contrary to Google's assertions of burden with respect to producing Mr. Leung's documents, Google informed Plaintiffs that their search term proposal resulted in just 982 hits and agreed to produce responsive documents.

6. The documents Google produced from Mr. Leung's files on February 18, 2022, appeared to confirm for the first time several key pieces of information that Google never previously disclosed to Plaintiffs, the Special Master, or the Court.

7. First, the [REDACTED] or [REDACTED] team had actually approved the plan to log the "maybe_chrome_incognito" bit in approximately [REDACTED] [REDACTED] logs. Ex. 3, GOOG-BRWN-

1 00845423.

2 8. *Second*, following that approval, Google implemented the change and began
3 logging the “maybe_chrome_incognito” field, likely around May or June 2021 after the [REDACTED] team
4 approved the change. Ex. 3, GOOG-BRWN-00845423; Ex. 9, GOOG-BRWN-00845312 at -18.

5 9. *Third*, Google engineers Bert Leung and Mandy Liu spent the next several months
6 continuing to refine and improve their Dashboard tool to detect and monitor third-party cookie
7 blocking based on those logging changes. Ex. 22, GOOG-BRWN-00845281; Ex. 23, GOOG-
8 BRWN-00845275; Ex. 24, GOOG-BRWN-00845274.

9 10. Google had previously never disclosed to Plaintiffs, the Special Master, or the
10 Court (a) that it had actually implemented a change to its logging practices in 2021 to log a
11 “maybe_chrome_incognito” field in (apparently) [REDACTED] logs or (b) the specific logs in which
12 that field resides. To the contrary, as explained below and in Plaintiffs’ accompanying
13 memorandum, Google went to great lengths to conceal this information throughout the discovery
14 process (and particularly in the last several months during the Court-ordered Special Master
15 process).

16 11. In September 2021, Google for the first time produced three *earlier* versions of the
17 document titled “Detect 3P Cookies Blocking Browsers” that discussed the possibility of logging
18 a “maybe_chrome_incognito” field. None of those documents (a) indicated that the
19 “maybe_chrome_incognito” field was actually implemented or (b) listed the specific [REDACTED] logs
20 in which the field would ultimately be included.

21 12. To the contrary, the most up-to-date version of the document that Google had
22 produced (prior to January 31, 2022) discussed an *earlier* plan—which Google subsequently
23 modified—to log the “maybe_incognito_bit” in a set of [REDACTED] logs called [REDACTED] logs. These were
24 *completely different logs* from the [REDACTED] logs in which Google appears to have ultimately
25 implemented the “maybe_chrome_incognito” field. For example, Google produced one such
26 document from Chris Liao’s files titled “Detect 3P Cookies Blocking Browsers,” which (a) was
27 “last updated: 05/04/2021” and (b) discussed the abandoned [REDACTED] logging plan (as opposed to the
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13. On November 12, 2021, the Court issued an order requiring that “Google shall provide a declaration, under penalty of perjury from Google, not counsel, that 1. To the best of its knowledge, *Google has provided a complete list of data sources that contain information relevant to Plaintiffs’ claims*” Dkt. 331 at 8 (emphasis added).

15. Exhibit A to Google’s declaration, in turn, *only listed* [REDACTED] *of the approximately* [REDACTED] *logs* that may contain the “maybe_chrome_incognito” field according to the most up-to-date version of the “Detect 3P Cookies Blocking Browsers” document that Google had produced on January 31, 2022. *Compare* Ex. Dkt. 338-1 (Google’s Ex. A) *with* Ex. 3, GOOG-BRWN-00845423. And Exhibit A also only listed [REDACTED] *of the approximately* [REDACTED] *logs* in which Google had *contemplated* logging the “maybe_chrome_incognito” bit according to the earlier design documents Google produced in September 2021. The chart below, created by Plaintiffs’ counsel, illustrates the extent of the declaration’s omissions:

DECLARATION OF MARK C. MAO
Case No. 4:20-cv-03664-YGR-SVK

1 16. The Court also ordered that “within four days of the date of this Order Google is to
2 provide to the Special Master full schemas, a list of ALL fields with their descriptions, a list of
3 tools used to search the respective data sources, and instruction sets and manuals for all tools
4 identified as being used by ‘Googlers’ to search each of the following data sources...” The Court
5 then listed (a) [REDACTED] specific logs, (b) “any data sources searched in addition to the [REDACTED] listed above,”
6 and (c) “[a]ny other of the data sources Plaintiffs specific from the list of potentially relevant data
7 sources provided by Google” Dkt. 331 Ex. 1.

8 17. On December 2, 2021, Google provided schema for [REDACTED] logs, including the only [REDACTED]
9 [REDACTED] logs identified in Google’s sworn declaration (*i.e.*, the only [REDACTED] logs Google disclosed that
10 actually, and unbeknownst to Plaintiffs, contained the “maybe_chrome_incognito” field).

11 18. However, rather than produce “full schemas and a “list of ALL fields with their
12 descriptions,” as the Court ordered, Google only produced field names for the “100 largest fields”
13 in the [REDACTED] [REDACTED] logs. None of those field names reflected the truth: that a
14 “maybe_chrome_incognito” field was included in those [REDACTED] logs.

15 19. Tellingly, for certain other logs that apparently do not include a
16 “maybe_chrome_incognito” field, Google was happy to produce more than the 100 largest fields.
17 For instance, on September 24, 2021, Google identified [REDACTED] fields in its [REDACTED] log.

18 20. As a result of Google’s conduct, neither Plaintiffs nor the Special Master had *any*
19 *idea that these [REDACTED] [REDACTED] logs contained the “maybe_chrome_incognito” field.* Nor did
20 Plaintiffs or the Special Master have any idea that there may have been approximately [REDACTED] *other,*
21 *undisclosed [REDACTED] logs* which also contained such a field.

22 21. The very next day on December 3, 2021, Plaintiffs deposed Google employee Chris
23 Liao, who is Bert Leung’s supervisor. Mr. Liao testified: “*There is no explicit signal to identify*
24 *incognito mode traffic.*” Ex. 8, Liao Tr. 132:2-3. Mr. Liao further testified that “*it was determined*
25 *that there was no reliable way to technically detect incognito in a definitive and reliable and*
26 *accurate manner. And as a result no further action was taken to build such a hypothetical*
27 *signal.*” I followed up by asking: “And that was within the confines of the existing architecture?”
28

1 Because you said that you didn't then build any new dedicated signals, right, for incognito mode."

2 Mr. Liao answered: "*I'm not certain if we can build that or not.*" *Id.* 134:15-135:3.

3 22. Based on the information Google had disclosed by December 2021, Plaintiffs had
4 no idea—and simply no reason to believe—that Google had (a) actually implemented its plan to
5 log a "maybe_chrome_incognito" field or (b) that such a field was apparently included in [REDACTED]
6 [REDACTED] logs (only [REDACTED] of which were even identified in Google's Court-ordered and sworn list of
7 data sources). To the contrary, the documents, sworn declaration, and testimony proffered by
8 Google suggested that the idea to log a "maybe_chrome_incognito" field in [REDACTED] logs (or
9 elsewhere) had simply never been implemented. As a result, Plaintiffs did not select for their
10 Iterative Search 1 either of the [REDACTED] [REDACTED] logs that Google disclosed in its sworn list of data
11 sources.

12 23. Google finally produced Mr. Leung's custodial documents on Friday, February 18,
13 2022, which set off a cascade of revelations that are the basis for this request for an order to show
14 cause. For the first time, Google produced evidence confirming that the
15 "maybe_chrome_incognito" field was actually logged in approximately [REDACTED] [REDACTED] logs.

16 24. On Sunday, February 20, 2022, Plaintiffs promptly alerted the Special Master and
17 Google that those documents appear to reveal that "Google has omitted from its prior lists a critical
18 data source—a [REDACTED] log" and the fact that Google had actually begun "adding a specific
19 Incognito detection field to both its Search and Display logs."

20 25. The next day on Monday, February 21, 2022, Google unilaterally cancelled Mr.
21 Leung's scheduled February 25, 2022 deposition, which had been set by written agreement.
22 Google claimed that "a conflict has arisen for Mr. Leung on February 25." Google insisted that the
23 deposition be rescheduled to March 4, 2022—the last day of fact discovery. Plaintiffs objected and
24 repeatedly asked, via a Zoom call and multiple times in writing, what this supposed conflict was.
25 Google refused to answer.

26 26. Plaintiffs thereafter met and conferred with Google on Wednesday, February 23,
27 2022, under the Special Master's supervision. During the meet and confer, Google indicated that
28

1 only one of the logs that Google identified in its November 2022 declaration contained the
2 “maybe_chrome_incognito” field. Google refused to answer Plaintiffs’ questions about what other
3 logs contain that field, telling Plaintiffs to ask Mr. Leung during his deposition. Plaintiffs still do
4 not have a list of the logs which logs contain this field (though based on documents Google
5 produced on January 31, 2022, and February 18, 2022, it appears that there may be [REDACTED] such [REDACTED]
6 logs). Google will not even confirm whether it withheld any logs with the Incognito detection field
7 that are specific to so-called “unauthenticated” data

8 27. Google also took the position during the meet and confer that it did not need to
9 produce any logs that are “Search” logs notwithstanding whether the logs contain the
10 “maybe_chrome_incognito” field. But the Special Master in December already deemed Search
11 logs to be within the scope of the process, particularly for class identification process.

12 28. Last November, following a document production, Plaintiffs were alarmed to
13 realize that one of logs that Mr. Leung was studying, the [REDACTED], had not yet been
14 disclosed. Plaintiffs promptly brought this missing log to the Special Master, and after reviewing
15 the documents, he directed Google to produce the log schema for the log and to run searches of
16 the log. Special Master Brush thus overruled Google’s objection that the log was irrelevant insofar
17 as it was a “Search” log. From that point forward, Google was indisputably on notice that it could
18 not withhold logs on the basis of the log being a “Search” log, particularly any log that Mr. Leung
19 studied for his analysis, let alone a log in which Mr. Leung actually implemented the Incognito
20 detection field.

21 29. Google has since then refused to tell Plaintiffs which other logs Mr. Leung
22 evaluated in the early stages of his “log analysis of Chrome Incognito.” After Special Master Brush
23 overruled Google’s objection on the [REDACTED] log, Plaintiffs asked Google whether any
24 other logs that Mr. Leung studied had been withheld. Counsel for Google never responded to
25 Plaintiffs’ multiple requests. *Id.*

26 30. Plaintiffs then propounded an interrogatory asking Google to “identify *every* log
27 and data source that Google reviewed, analyzed, or searched as part of Google’s efforts to conduct
28

1 a 'log analysis of Chrome Incognito' in and around mid-2020. *See, e.g.*, GOOG-CABR-
2 05280756." Google did not answer that question, either. Google instead evaded it by merely
3 quoting back *one* of the logs that was already mentioned in the email that Plaintiffs cited. ("Google
4 used [REDACTED] in the analysis of Ad Manager browsing traffic described in GOOG-
5 CABR-05280756."). Google's evasion was improper. Google has subsequently clarified in meet-
6 and-confers that Mr. Leung's analysis was not limited to the logs mentioned in this one document,
7 and yet Plaintiffs still do not have a complete list of every data source that Mr. Leung studied,
8 much less a complete list of the logs in which "maybe_chrome_incognito" field has officially been
9 implemented.

10 31. Over the course of the past week, Plaintiffs have asked Google to remedy the
11 prejudice it has caused in multiple, reasonable ways: (a) by producing Mandy Liu's custodial
12 documents that hit on limited search terms tied to her work with Mr. Leung concerning the
13 "maybe_chrome_incognito" field and permitting a 2-hour deposition of her; (b) by extending the
14 fact discovery cut-off so that Plaintiffs can complete their discovery of Plaintiffs' data and the
15 "maybe_chrome_incognito" field; and (c) by identifying every other log that contains the
16 "maybe_chrome_incognito" bit and promptly producing all schema, all field names, and all field
17 descriptions from such logs (and subsequently searching them and producing full results). Google
18 has simply refused.

19 32. Attached hereto as **Exhibit 1** is a true and correct copy of a document Google produced
20 in discovery labeled GOOG-BRWN-00845639. The document was produced on February 18,
21 2022.

22 33. Attached hereto as **Exhibit 2** is a true and correct copy of a document Google
23 produced in discovery labeled GOOG-BRWN-00845596. The document was produced on
24 February 18, 2022.

25 34. Attached hereto as **Exhibit 3** is a true and correct copy of a document Google produced
26 in discovery labeled GOOG-BRWN-00845423. The document was produced on February 18,
27 2022.

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1 35. Attached hereto as **Exhibit 4** is a true and correct copy of a document Google
2 produced in discovery labeled GOOG-BRWN-00023909. The document was produced on
3 February 1, 2021.

4 36. Attached hereto as **Exhibit 5** is a true and correct copy of Plaintiffs' Interrogatories Set
5 2.

6 37. Attached hereto as **Exhibit 6** is a true and correct copy of Google's Responses and
7 Objections Plaintiffs' Interrogatories Set 2.

8 38. Attached hereto as **Exhibit 7** is a true and correct copy of a February 21, 2022 email
9 exchange between counsel for Plaintiffs and counsel for Google.

10 39. Attached hereto as **Exhibit 8** are excerpts from the December 2, 2021 deposition of
11 Google employee Chris Liao.

12 40. Attached hereto as **Exhibit 9** is a true and correct copy of a document Google produced
13 in discovery labeled GOOG-BRWN-00845312. The document was produced on February 18,
14 2022.

15 41. Attached hereto as **Exhibit 10** is a true and correct copy of a document Google
16 Produced in discovery labeled GOOG-BRWN-00845569. The document was produced on
17 February 18, 2022.

18 42. Attached hereto as **Exhibit 11** is a true and correct copy of a document Google
19 produced in discovery labeled GOOG-BRWN-00845277. The document was produced on
20 February 18, 2022.

21 43. Attached hereto as **Exhibit 12** are excerpts from a document Google produced in
22 discovery labeled GOOG-CABR-05144884. The document was produced on November 16, 2021.

23 44. Attached hereto as **Exhibit 13** is a true and correct copy of Google's Responses and
24 Objections to Plaintiffs' First Set of Requests for Production (Nos. 1-19).

25 45. Attached hereto as **Exhibit 14** is a true and correct copy of a document Google
26 produced in discovery labeled GOOG-CABR-04324934. The document was produced on October
27 5, 2021.

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1 46. Attached hereto as **Exhibit 15** is a true and correct copy of a document Google
2 produced in discovery labeled GOOG-BRWN-00845477. The document was produced on
3 February 18, 2022.

4 47. Attached hereto as **Exhibit 16** is a true and correct copy of a document Google
5 produced in discovery labeled GOOG-BRWN-00845481. The document was produced on
6 February 18, 2022.

7 48. Attached hereto as **Exhibit 17** is a true and correct copy of a document Google
8 produced in discovery labeled GOOG-BRWN-00845437. The document was produced on
9 February 18, 2022. Part of the document is not visible because of how Google produced it.
10 Plaintiffs consulted the metadata for the full text.

11 49. Attached hereto as **Exhibit 18** is a true and correct copy of a document Google
12 produced in discovery labeled GOOG-CABR-05280756. The document was produced on
13 November 24, 2021.

14 50. Attached hereto as **Exhibit 19** are excerpts of Google's Responses and
15 Objections to Plaintiffs' Ninth Set of Interrogatories.

16 51. Attached hereto as **Exhibit 20** is a true and correct copy of a February 23, 2022 email
17 exchange between counsel for Plaintiffs and counsel for Google.

18 52. Attached hereto as **Exhibit 21** is a true and correct copy of a document Google
19 produced in discovery labeled GOOG-CABR-05757329. The document was produced on January
20 31, 2022.

21 53. Attached hereto as **Exhibit 22** is a true and correct copy of a document Google
22 produced in discovery labeled GOOG-BRWN-00845281. The document was produced on
23 February 18, 2022.

24 54. Attached hereto as **Exhibit 23** is a true and correct copy of a document Google
25 produced in discovery labeled GOOG-BRWN-00845275. The document was produced on
26 February 18, 2022.

27 55. Attached hereto as **Exhibit 24** is a true and correct copy of a document Google
28

1 produced in discovery labeled GOOG-BRWN-00845274. The document was produced on
2 February 18, 2022.

3 56. Attached hereto as **Exhibit 25** is a true and correct copy of a document Google
4 produced in discovery labeled GOOG-CABR-03668216. The document was produced on
5 September 24, 2021.

6
7 I declare under penalty of perjury under the laws of the United States of America that the
8 foregoing is true and correct. Executed this 25th day of February, 2022, at Fremont, California.

9 /s/ Mark Mao
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EXHIBIT 1

FILED UNDER SEAL

Message

From: Google Forms [forms-receipts-noreply@google.com]
Sent: 6/9/2020 12:15:35 AM
To: bertleung@google.com
Subject: PWG-Display Sellside Silo Office Hours Booking

Thanks for filling out PWG-Display Sellside Silo Office Hours Booking

Here's what we got from you:

PWG-Display Sellside Silo Office Hours Booking

Complete this form to book a slot for PWG-Display Office Hours. If you've booked a slot and need to cancel, please ping/email katrinaswanson@.

Your email address (**bertleung@google.com**) was recorded when you submitted this form.

Top of Form

What is your primary goal for attending Office Hours? *

Select the first option that applies.

I was asked by a PWG representative (Display or otherwise) to attend PWG-Display Office Hours

I need the privacy bit for my launch approved

I have a few simple privacy questions or concerns

I have multiple or complex privacy questions / concerns

Project Details

Help us help you help us all. Details about your project help us get the right folks in the room so that we can most efficiently answer your questions!

What is the name of your project/launch? *

Detect 3P Cookies Blocking Browsers

Who is the presenter? *

Please enter the presenter's username. This could be you or another person.

bertleung

Who else should be invited to the Office Hours slot? *

Comma separated list of usernames. If you're not the presenter but need to attend, add yourself!

bertleung

What is this launch/product about? Give the elevator pitch, providing a quick summary to someone who has no idea what you do. *

Detect 3P cookie blocking browsers (Safari ITP, Firefox ETP, Chrome Incognito, etc) in ad serving, and log this information for monitoring and analysis.

In your opinion, what are the privacy or other vulnerabilities? Do you propose any mitigation? *

Potential privacy risk of logging inferred Chrome Incognito detection, would like to get feedback from privacy gurus.

If you have an Ariane launch, please link it below: *

Not yet.

Please link to any relevant docs, including design docs, presentation decks, etc. *

go/3p-blocking-browsers

If this is not a first launch, what is the delta from the last time it was reviewed by the Privacy team? *

This is the first design.

Have you visited PWG-Display office hours before for this topic? Include the date if you remember it.

*

This is the first time.

Have you consulted directly with anyone in any PWG or the Ads Privacy team outside of Office Hours? If so, who? *

This includes anyone from the Ads Internal Controls team, Ads Transparency and Control team, Serving Ads Privacy Team, Ads Identity, or Ads Partner Policy team.

No.

Have you been in contact with your PCounsel regarding this launch? If so, please include their LDAP.

*

Not sure who your PCounsel is? Check <https://goto.google.com/whichlawyer>

Not yet.

Booking Details

Tell us when you want to attend Office Hours!

When would you like to attend Office Hours? *

If none of the available options work for you, please reach out to pwg-display@.

Thu Jun 18 2020 10:30:00 GMT-0700 (Pacific Daylight Time)

Thu Jun 18 2020 10:45:00 GMT-0700 (Pacific Daylight Time)

Thu Jun 25 2020 10:30:00 GMT-0700 (Pacific Daylight Time)

Thu Jun 25 2020 10:45:00 GMT-0700 (Pacific Daylight Time)

Thu Jul 09 2020 10:30:00 GMT-0700 (Pacific Daylight Time)

Thu Jul 09 2020 10:45:00 GMT-0700 (Pacific Daylight Time)

Bottom of Form

[Create your own Google Form](#)

EXHIBIT 2

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Message

From: Mandy Liu (Google Docs) [comments-noreply@docs.google.com]
Sent: 10/6/2020 12:34:54 AM
To: bertleung@google.com
Subject: Detect 3P Cookie ... - nit: we will need a more scary name t...

Mandy Liu resolved a comment in the following document



Detect 3P Cookie Blocking Browser Technical Design

maybe_chrome_incognito



Bert Leung

nit: we will need a more scary name to deter un-approved usages.



Mandy Liu

New

Marked as resolved

Open

Google LLC, 1600 Amphitheatre Parkway, Mountain View, CA 94043, USA

You have received this email because you are a participant in this thread. Change what Google Docs sends you. You can reply to this email to reply to the discussion.



EXHIBIT 3

Redacted in its
Entirely

EXHIBIT 4

Redacted in its
Entirely

EXHIBIT 8

Redacted Version of
Document Sought to
be Sealed

CONFIDENTIAL - ATTORNEYS' EYES ONLY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

---o0o---

PATRICK CALHOUN, et al.,)
on behalf of themselves and)
all others similarly)
situated,)

Plaintiffs,)Case No.

)5:20-cv-5146-LHK-SVK

vs.)

GOOGLE LLC,)

Defendant.)

CHASOM BROWN, et al.,)

on behalf of themselves and)

all others similarly)

situated,)

Plaintiffs,)Case No.

)5:20-cv-03664-LHK

vs.)

GOOGLE LLC,)

Defendant.)

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Videotaped Zoom Deposition of
HUEI-HUNG (CHRIS) LIAO
CONFIDENTIAL, ATTORNEYS' EYES ONLY
Friday, December 3, 2021

---o0o---

Katy E. Schmidt
RPR, RMR, CRR, CSR 13096
Veritext Job No.: 4962198

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<p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA 3 SAN JOSE DIVISION 4 ---o0o--- 5 PATRICK CALHOUN, et al ,) 6 on behalf of themselves and) 7 all others similarly) 8 situated,) 9) 10 Plaintiffs,)Case No 11)5:20-cv-5146-LHK-SVK 12 vs) 13) 14 GOOGLE LLC,) 15) 16 Defendant) 17) 18) 19 CHASOM BROWN, et al ,) 20 on behalf of themselves and) 21 all others similarly) 22 situated,) 23) 24 Plaintiffs,)Case No 25)5:20-cv-03664-LHK 26 vs) 27) 28 GOOGLE LLC,) 29) 30 Defendant) 31) 32) 33 BE IT REMEMBERED that, pursuant to Notice, and 34 on Friday, the 3rd day of December, 2021, commencing at 35 the hour of 9:05 a m , thereof, in Sunnyvale, 36 California, before me, KATY E SCHMIDT, a Certified 37 Shorthand Reporter in and for the County of Yolo, State 38 of California, there virtually personally appeared 39 HUEL-HUNG (CHRIS) LIAO 40 called as a witness herein, who, being by me first duly 41 sworn, was thereupon examined and interrogated as 42 hereinafter set forth 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 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807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000 1001 1002 1003 1004 1005 1006 1007 1008 1009 1010 1011 1012 1013 1014 1015 1016 1017 1018 1019 1020 1021 1022 1023 1024 1025 1026 1027 1028 1029 1030 1031 1032 1033 1034 1035 1036 1037 1038 1039 1040 1041 1042 1043 1044 1045 1046 1047 1048 1049 1050 1051 1052 1053 1054 1055 1056 1057 1058 1059 1060 1061 1062 1063 1064 1065 1066 1067 1068 1069 1070 1071 1072 1073 1074 1075 1076 1077 1078 1079 1080 1081 1082 1083 1084 1085 1086 1087 1088 1089 1090 1091 1092 1093 1094 1095 1096 1097 1098 1099 1100 1101 1102 1103 1104 1105 1106 1107 1108 1109 1110 1111 1112 1113 1114 1115 1116 1117 1118 1119 1120 1121 1122 1123 1124 1125 1126 1127 1128 1129 1130 1131 1132 1133 1134 1135 1136 1137 1138 1139 1140 1141 1142 1143 1144 1145 1146 1147 1148 1149 1150 1151 1152 1153 1154 1155 1156 1157 1158 1159 1160 1161 1162 1163 1164 1165 1166 1167 1168 1169 1170 1171 1172 1173 1174 1175 1176 1177 1178 1179 1180 1181 1182 1183 1184 1185 1186 1187 1188 1189 1190 1191 1192 1193 1194 1195 1196 1197 1198 1199 1200 1201 1202 1203 1204 1205 1206 1207 1208 1209 1210 1211 1212 1213 1214 1215 1216 1217 1218 1219 1220 1221 1222 1223 1224 1225 1226 1227 1228 1229 1230 1231 1232 1233 1234 1235 1236 1237 1238 1239 1240 1241 1242 1243 1244 1245 1246 1247 1248 1249 1250 1251 1252 1253 1254 1255 1256 1257 1258 1259 1260 1261 1262 1263 1264 1265 1266 1267 1268 1269 1270 1271 1272 1273 1274 1275 1276 1277 1278 1279 1280 1281 1282 1283 1284 1285 1286 1287 1288 1289 1290 1291 1292 1293 1294 1295 1296 1297 1298 1299 1300 1301 1302 1303 1304 1305 1306 1307 1308 1309 1310 1311 1312 1313 1314 1315 1316 1317 1318 1319 1320 1321 1322 1323 1324 1325 1326 1327 1328 1329 1330 1331 1332 1333 1334 1335 1336 1337 1338 1339 1340 1341 1342 1343 1344 1345 1346 1347 1348 1349 1350 1351 1352 1353 1354 1355 1356 1357 1358 1359 1360 1361 1362 1363 1364 1365 1366 1367 1368 1369 1370 1371 1372 1373 1374 1375 1376 1377 1378 1379 1380 1381 1382 1383 1384 1385 1386 1387 1388 1389 1390 1391 1392 1393 1394 1395 1396 1397 1398 1399 1400 1401 1402 1403 1404 1405 1406 1407 1408 1409 1410 1411 1412 1413 1414 1415 1416 1417 1418 1419 1420 1421 1422 1423 1424 1425 1426 1427 1428 1429 1430 1431 1432 1433 1434 1435 1436 1437 1438 1439 1440 1441 1442 1443 1444 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1645 1646 1647 1648 1649 1650 1651 1652 1653 1654 1655 1656 1657 1658 1659 1660 1661 1662 1663 1664 1665 1666 1667 1668 1669 1670 1671 1672 1673 1674 1675 1676 1677 1678 1679 1680 1681 1682 1683 1684 1685 1686 1687 1688 1689 1690 1691 1692 1693 1694 1695 1696 1697 1698 1699 1700 1701 1702 1703 1704 1705 1706 1707 1708 1709 1710 1711 1712 1713 1714 1715 1716 1717 1718 1719 1720 1721 1722 1723 1724 1725 1726 1727 1728 1729 1730 1731 1732 1733 1734 1735 1736 1737 1738 1739 1740 1741 1742 1743 1744 1745 1746 1747 1748 1749 1750 1751 1752 1753 1754 1755 1756 1757 1758 1759 1760 1761 1762 1763 1764 1765 1766 1767 1768 1769 1770 1771 1772 1773 1774 1775 1776 1777 1778 1779 1780 1781 1782 1783 1784 1785 1786 1787 1788 1789 1790 1791 1792 1793 1794 1795 1796 1797 1798 1799 1800 1801 1802 1803 1804 1805 1806 1807 1808 1809 1810 1811 1812 1813 1814 1815 1816 1817 1818 1819 1820 1821 1822 1823 1824 1825 1826 1827 1828 1829 1830 1831 1832 1833 1834 1835 1836 1837 1838 1839 1840 1841 1842 1843 1844 1845 1846 1847 1848 1849 1850 1851 1852 1853 1854 1855 1856 1857 1858 1859 1860 1861 1862 1863 1864 1865 1866 1867 1868 1869 1870 1871 1872 1873 1874 1875 1876 1877 1878 1879 1880 1881 1882 1883 1884 1885 1886 1887 1888 1889 1890 1891 1892 1893 1894 1895 1896 1897 1898 1899 1900 1901 1902 1903 1904 1905 1906 1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920 1921 1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946 1947 1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 </p>

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<p>1 BY MR. MAO: 12:53</p> <p>2 Q. Good afternoon, Mr. Liao. 12:53</p> <p>3 If I can trouble you to pull Exhibit No. 4. 12:53</p> <p>4 Thank you. 12:53</p> <p>5 A. Exhibit No. 4. 12:53</p> <p>6 Q. Yeah. It's the "Ads Identity & 12:53</p> <p>7 Infrastructure" document again. 12:53</p> <p>8 A. I have it. 12:53</p> <p>9 Q. If you don't mind going to page 11, which is 12:53</p> <p>10 on the bottom 24. It should be -- let's see -- that 12:53</p> <p>11 page. I know it's a very long document. 12:53</p> <p>12 A. I have it. 12:53</p> <p>13 Q. Okay. Great. 12:54</p> <p>14 By the way, were you the author or one of the 12:54</p> <p>15 authors of this presentation? 12:54</p> <p>16 A. Yes. 12:54</p> <p>17 Q. On the top right there, what exactly is an 12:54</p> <p>18 identity handler? 12:54</p> <p>19 A. I believe I created this slide, but I borrowed 12:54</p> <p>20 some graphics created earlier by other people. And the 12:54</p> <p>21 diagrams containing the identity handler was one of the 12:54</p> <p>22 graphics I borrowed. 12:54</p> <p>23 In this case, I think identity handlers refers 12:54</p> <p>24 to what eventually became [REDACTED] 12:54</p> <p>25 Q. Got it. 12:54</p> <p style="text-align: right;">Page 122</p>	<p>1 P-logs and B-logs or variance from P-logs and B-logs? 12:56</p> <p>2 A. No. 12:56</p> <p>3 Q. So what is the identity handler there doing 12:56</p> <p>4 with regard to P-logs and B-logs? 12:57</p> <p>5 A. In the middle diagram, the identity handler is 12:57</p> <p>6 not directly interacting with P-logs and B-logs. 12:57</p> <p>7 Q. What instead is it doing? 12:57</p> <p>8 A. I believe the diagram is trying to convey, for 12:57</p> <p>9 example, encrypted Biscotti cookie coming from the 12:57</p> <p>10 external world. And then the identity handler, which 12:57</p> <p>11 eventually became [REDACTED] handles it by decrypting and then 12:57</p> <p>12 later re-encrypting into other -- using other forms of 12:57</p> <p>13 encryption, and then making the correct identity signals 12:57</p> <p>14 and privacy instructions available to the rest of this 12:57</p> <p>15 stack, which, I believe, is represented by the larger 12:58</p> <p>16 box at the middle of the graphic. 12:58</p> <p>17 Q. So what my -- is something wrong with my 12:58</p> <p>18 phraseology in saying that [REDACTED] in this situation would 12:58</p> <p>19 be handling data from both P-logs and B-logs? 12:58</p> <p>20 How would I state that properly? 12:58</p> <p>21 MR. ANSORGE: Objection. Vague. Form. 12:58</p> <p>22 THE WITNESS: I'm not exactly sure. But I 12:58</p> <p>23 can -- I can -- my understanding is that [REDACTED] in this 12:58</p> <p>24 case is processing identity signals as they come from 12:58</p> <p>25 the external world, and that [REDACTED] is not directly 12:58</p> <p style="text-align: right;">Page 124</p>
<p>1 And so this is an older -- this is the old 12:54</p> <p>2 original serving model and not the current [REDACTED] serving 12:54</p> <p>3 model. 12:54</p> <p>4 Is that right? Or do I have that wrong? 12:54</p> <p>5 A. As I stated, I did not create the graphics on 12:55</p> <p>6 this particular slide. So I think some of the graphics 12:55</p> <p>7 does look outdated, including referring -- having 12:55</p> <p>8 referred to [REDACTED] with a different name. 12:55</p> <p>9 Q. Okay. But I think what you're trying to -- 12:55</p> <p>10 what you were trying to show in the middle column of 12:55</p> <p>11 these three columns is that the identity handler -- 12:55</p> <p>12 A. Oh, that's my Nest thermal detector auto 12:55</p> <p>13 testing. I apologize for the disruption. 12:55</p> <p>14 Q. Oh, no worries. I've had that happen before 12:55</p> <p>15 with my Nest. 12:55</p> <p>16 That middle column, were you trying to show 12:55</p> <p>17 with that middle column that the identity handler is 12:55</p> <p>18 handling data that goes into the stack from both I guess 12:56</p> <p>19 P-logs and B-logs? 12:56</p> <p>20 MR. ANSORGE: Objection. Vague. 12:56</p> <p>21 THE WITNESS: I believe the middle diagram is 12:56</p> <p>22 trying to explain the forms of identity that come into 12:56</p> <p>23 [REDACTED] [REDACTED] does not produce P-logs or B-logs. 12:56</p> <p>24 BY MR. MAO: 12:56</p> <p>25 Q. But it accesses a variant of the data from the 12:56</p> <p style="text-align: right;">Page 123</p>	<p>1 producing P-logs or B-logs. 12:58</p> <p>2 BY MR. MAO: 12:58</p> <p>3 Q. Got it. 12:58</p> <p>4 So are these signals coming in from the 12:58</p> <p>5 external world the same signals that would have -- or I 12:58</p> <p>6 guess variants of the signals that went into the P-logs 12:59</p> <p>7 and B-logs? 12:59</p> <p>8 A. I can't speak to the full extent of the 12:59</p> <p>9 information that goes into P-logs and B-logs. But 12:59</p> <p>10 identity signals and privacy instructions under some 12:59</p> <p>11 circumstances can be present in P-logs and B-logs. 12:59</p> <p>12 Q. Got it. 12:59</p> <p>13 So I think you were asked about this 12:59</p> <p>14 yesterday, if you don't mind going down to page -- 12:59</p> <p>15 sorry. My .pdf number is not coming up for some 12:59</p> <p>16 reason -- page 13. 12:59</p> <p>17 A. Page 13. 12:59</p> <p>18 Q. Which is 26 on the bottom. 12:59</p> <p>19 A. 26. I have it. 12:59</p> <p>20 Q. It's -- yeah. It's this chart, this one that 12:59</p> <p>21 you were asked about yesterday. 01:00</p> <p>22 A. I have it. 01:00</p> <p>23 Q. Yep. Great. 01:00</p> <p>24 So with regard to this chart, I guess are 01:00</p> <p>25 Gaia cookies and Biscotti cookies here in the middle and 01:00</p> <p style="text-align: right;">Page 125</p>

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<p>1 also PPID on the right there, are these all external 01:00</p> <p>2 signals -- I'm sorry -- signal -- identity signals 01:00</p> <p>3 coming in from the external world? 01:00</p> <p>4 A. Yes. 01:00</p> <p>5 Q. And that is getting parsed on the top right 01:00</p> <p>6 where it says the "Parsing Layer." And where does [REDACTED] 01:00</p> <p>7 sit in this chart? 01:00</p> <p>8 A. In this chart, [REDACTED] is represented by the 01:00</p> <p>9 larger bounding box containing the individual smaller 01:00</p> <p>10 boxes. 01:00</p> <p>11 Q. Got it. Okay. 01:00</p> <p>12 So [REDACTED] is the bigger gray box covering all the 01:01</p> <p>13 yellow boxes. 01:01</p> <p>14 And I guess are you trying to convey that it's 01:01</p> <p>15 ingesting the different identity signals coming in from 01:01</p> <p>16 the external world to move downward in the process in 01:01</p> <p>17 terms of what comes out? 01:01</p> <p>18 MR. ANSORGE: Objection. Vague and form. 01:01</p> <p>19 BY MR. MAO: 01:01</p> <p>20 Q. I'm just trying to understand literally what 01:01</p> <p>21 you're trying to convey with this graph. 01:01</p> <p>22 A. The graph is trying to describe the 01:01</p> <p>23 internal -- some of the internal components of [REDACTED] by 01:01</p> <p>24 their logical functional grouping. 01:01</p> <p>25 Q. Ah. Got it. 01:01</p> <p style="text-align: right;">Page 126</p>	<p>1 I believe the parsing layer, the enrichment 01:03</p> <p>2 layer, and the selection layer, I believe they 01:03</p> <p>3 correspond to the previous diagram with the layers of 01:03</p> <p>4 the same names. 01:03</p> <p>5 This one is the diagram I drew. I don't know 01:03</p> <p>6 if the entire yellowish box on this slide 14 refers to 01:03</p> <p>7 [REDACTED] or not, but I think the three layers represented on 01:03</p> <p>8 this slide do represent the same layers that I had 01:03</p> <p>9 designated for [REDACTED] on the previous slide. 01:03</p> <p>10 BY MR. MAO:</p> <p>11 Q. Got it. Got it. 01:04</p> <p>12 So you would probably say at least for what's 01:04</p> <p>13 sandwiched between the green end red layer and 01:04</p> <p>14 everything in between, that's essentially what would 01:04</p> <p>15 correspond to the gray portion in the prior graph in the 01:04</p> <p>16 prior page? 01:04</p> <p>17 A. I think so. 01:04</p> <p>18 Q. Got it. Okay. That's super helpful. Thank 01:04</p> <p>19 you so much. 01:04</p> <p>20 (Plaintiffs' Exhibit 25 was 01:04</p> <p>21 marked for identification.) 01:04</p> <p>22 BY MR. MAO: 01:04</p> <p>23 Q. If you don't mind, I had introduced into 01:04</p> <p>24 Exhibit -- let me just make sure I have the right number 01:04</p> <p>25 here. Sorry. It should be Exhibit No. 25. Would you 01:04</p> <p style="text-align: right;">Page 128</p>
<p>1 And then if you move down one more page, and 01:01</p> <p>2 you were asked about this as well yesterday, which is 01:01</p> <p>3 page 13, and on the bottom it should be 27. 01:01</p> <p>4 A. 27. 01:02</p> <p>5 Q. Yeah. 01:02</p> <p>6 A. I have it. 01:02</p> <p>7 Q. Yep. This one? 01:02</p> <p>8 A. Yes. 01:02</p> <p>9 Q. Is this entire yellow box part of [REDACTED] or 01:02</p> <p>10 where does [REDACTED] sit on this chart? And let me give you a 01:02</p> <p>11 little bit of idea of why I'm asking this. 01:02</p> <p>12 I'm trying to understand -- you see everything 01:02</p> <p>13 that's on the right side because it looks to me like 01:02</p> <p>14 this is going from left to right. 01:02</p> <p>15 I'm trying to understand if everything that 01:02</p> <p>16 comes out on the right-hand side there from, you know, 01:02</p> <p>17 "Biscotti cookie" on the top, all the way down to the 01:02</p> <p>18 bottom to the "GFP Cookie," are these all outputs and 01:02</p> <p>19 responsibilities that, you know, [REDACTED] is responsible for 01:02</p> <p>20 or is this some other part of the layer? Or some other 01:02</p> <p>21 process? Sorry. I'm trying to understand. 01:02</p> <p>22 MR. ANSORGE: Objection. Form and compound. 01:02</p> <p>23 THE WITNESS: I -- as I stated yesterday, I 01:03</p> <p>24 did not personally create this particular slide, 01:03</p> <p>25 although I included it in the presentation deck. 01:03</p> <p style="text-align: right;">Page 127</p>	<p>1 mind pulling that? 01:04</p> <p>2 A. Exhibit 25. 01:04</p> <p>3 Q. I think it's "ID Enrichment." 01:04</p> <p>4 A. I have it. 01:04</p> <p>5 Q. Yeah. Take some time to familiarize yourself 01:04</p> <p>6 with it. 01:04</p> <p>7 And my first question to you is basically 01:04</p> <p>8 going to be have you seen this before? 01:04</p> <p>9 A. I don't recall seeing it. I may have been 01:05</p> <p>10 present in the room the presentation was given, but I 01:05</p> <p>11 have no recollection at this moment. 01:05</p> <p>12 Q. Got it. 01:05</p> <p>13 Would you mind going to page 4, which is 59 on 01:05</p> <p>14 the bottom right? 01:05</p> <p>15 A. Can I take a brief moment to read through -- 01:05</p> <p>16 Q. Of course. Please. Please do. Thank you so 01:05</p> <p>17 much. 01:05</p> <p>18 A. Okay. 01:06</p> <p>19 Q. I'm still at page -- sorry. Not complaining 01:06</p> <p>20 about the deposition software -- page 3 on the bottom 01:06</p> <p>21 right. 01:06</p> <p>22 A. Page 3. 01:06</p> <p>23 Q. Yeah. Bottom right. It would be 59. 01:06</p> <p>24 A. 59. 01:06</p> <p>25 Q. Yes. 01:06</p> <p style="text-align: right;">Page 129</p>

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1 A. Okay. I have it. 01:06	1 traffic? 01:10
2 Q. This looks to me to basically be a variant of 01:06	2 A. There is no explicit signal to identify 01:10
3 your prior graph, I think. 01:07	3 incognito mode traffic. 01:10
4 You could take a look -- 01:07	4 Q. Were you ever involved in any discussions on 01:10
5 A. It appears so. 01:07	5 whether or not [REDACTED] should be designed to receive and 01:10
6 Q. Yeah. 01:07	6 parse such a signal? 01:10
7 So my question to you, and I think -- I think 01:07	7 A. I was involved in projects having to work with 01:10
8 Mr. Barnes asked this, either from this graph or the 01:07	8 incognito mode. 01:10
9 graph like you saw before on the other exhibit that was 01:07	9 Q. Was there a discussion on whether or not that 01:10
10 right below this. 01:07	10 should be a signal to [REDACTED]? Whether or not that design 01:10
11 I think my question to you is -- I think -- 01:07	11 should include, you know, a signal to [REDACTED] saying that 01:10
12 oh, yes. There, I see it. It's been grayed out. 01:07	12 the user or device was browsing in incognito mode? 01:10
13 You see on the top right, right under "Parse 01:07	13 A. I do not recall if there was a specific 01:10
14 PPID," there's a "Parse privacy req params"? 01:07	14 discussion around using the URL parameter as a signal 01:10
15 Again, I might be referring to the wrong one 01:07	15 to [REDACTED] to indicate incognito mode. 01:10
16 of two graphs. But I believe that you said that that's 01:07	16 But as I stated, I was involved in projects 01:11
17 parsing whether or not the incoming signal from the 01:07	17 related to incognito mode. 01:11
18 external world contains a privacy preference or setting 01:07	18 Q. How about amongst those projects that you were 01:11
19 of some type. 01:07	19 involved, were there any discussions on whether or not 01:11
20 Is that -- do I have that right? 01:08	20 there were any other types of signals other than a URL 01:11
21 MR. ANSORGE: Objection. Mischaracterizes 01:08	21 parameter signal for incognito traffic that would be 01:11
22 prior testimony. 01:08	22 given to [REDACTED] at the -- 01:11
23 THE WITNESS: For the box of "parse privacy 01:08	23 MR. ANSORGE: Objection. 01:11
24 req," which stands for "request," parameters, the 01:08	24 MR. MAO: Sorry. It was at the parsing layer, 01:11
25 purpose of this piece of logic is to parse the URL 01:08	25 Ms. Court Reporter. 01:11
Page 130	Page 132
1 parameters that are related to privacy treatment as we 01:08	1 Yeah. Go ahead, Joey, please. 01:11
2 receive from the URL network request itself. 01:08	2 MR. ANSORGE: Yeah. Objection. Vague. 01:11
3 As I stated yesterday, I believe some of the 01:08	3 THE WITNESS: Can you clarify which part of 01:11
4 examples of such a URL can be, for example, GDPR, which 01:08	4 [REDACTED] you're referring to in this question? 01:11
5 indicates to our systems that applicable GDPR behaviors 01:08	5 BY MR. MAO: 01:11
6 have to be enabled for this particular ad query. 01:08	6 Q. Sure. Sure. 01:11
7 I believe another example I gave was TFCD, 01:08	7 I'm looking at the parsing layer. And my 01:11
8 which stands for "treat for child directed." I believe 01:09	8 understanding of that is that that's the first layer 01:11
9 the presence of the parameter enables our systems to 01:09	9 that kind of hits [REDACTED] that says, hey, here are all the 01:11
10 treat the ad query with the necessary child directed 01:09	10 signals coming from the external world in which, you 01:11
11 treatments. 01:09	11 know, like might be relevant, you know, for terms of 01:11
12 BY MR. MAO: 01:09	12 UIS digesting and then spitting out whatever it spits 01:11
13 Q. Got it. Got it. 01:09	13 out on the other end. 01:11
14 As far as you're aware, amongst these privacy 01:09	14 My question is -- you limited your prior 01:11
15 signals, is there one for incognito mode browsing on 01:09	15 answers to a URL signal for [REDACTED] and you not being aware 01:12
16 Chrome? 01:09	16 of that being a discussion. 01:12
17 A. No. 01:09	17 My question to you is whether or not you're 01:12
18 Q. Is there a reason that you're aware as to why 01:09	18 aware of a discussion or proposal on a non-URL signal 01:12
19 that would not be a privacy req parameter for [REDACTED]? 01:09	19 that would be sent to [REDACTED]? 01:12
20 MR. ANSORGE: Objection. Form. 01:09	20 A. I do not recall the specifics of such a 01:12
21 THE WITNESS: I am not aware of a URL 01:09	21 discussion. I do not recall if such a discussion -- 01:12
22 parameter that would indicate incognito mode. 01:09	22 specific discussion happened. 01:12
23 BY MR. MAO: 01:09	23 But as I stated, I was involved in projects 01:12
24 Q. What about a parameter specifically to signal 01:09	24 that have -- have to do with incognito mode. And there 01:12
25 to [REDACTED] to parse out that, oh, this is incognito mode 01:09	25 was discussion around proxy signals that we can use to 01:12
Page 131	Page 133

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<p>1 approximate incognito traffic. However, we were not 01:12</p> <p>2 able to identify any definitive or reliable signal to 01:12</p> <p>3 identify incognito mode in the end. 01:12</p> <p>4 Q. That's based on existing signals or is that 01:12</p> <p>5 based on signals that you can build? 01:13</p> <p>6 MR. ANSORGE: Objection. Vague. 01:13</p> <p>7 THE WITNESS: The conversations were based on 01:13</p> <p>8 signals that existed at the time. We did not, to my 01:13</p> <p>9 best knowledge, go on to build any dedicated signals 01:13</p> <p>10 afterwards either. 01:13</p> <p>11 BY MR. MAO: 01:13</p> <p>12 Q. What was the reason you didn't build any 01:13</p> <p>13 dedicated signals afterwards to [REDACTED]? 01:13</p> <p>14 MR. ANSORGE: Objection. Foundation. 01:13</p> <p>15 THE WITNESS: There was -- after those 01:13</p> <p>16 conversations, it was determined that there was no 01:13</p> <p>17 reliable way to technically detect incognito in a 01:13</p> <p>18 definitive and reliable and accurate manner. And as a 01:13</p> <p>19 result, no further action was taken to build such a 01:13</p> <p>20 hypothetical signal. 01:14</p> <p>21 BY MR. MAO: 01:14</p> <p>22 Q. And that was within the confines of the 01:14</p> <p>23 existing architecture? Because you said that you didn't 01:14</p> <p>24 then build any new dedicated signals, right, for 01:14</p> <p>25 incognito mode. 01:14</p> <p style="text-align: right;">Page 134</p>	<p>1 BY MR. MAO: 01:15</p> <p>2 Q. Did you explore whether or not you would use 01:15</p> <p>3 the X-Client-Data header as a signal? 01:15</p> <p>4 A. Yes. 01:15</p> <p>5 Q. And what was the conclusion on that? 01:16</p> <p>6 A. We did explore the use of X-Data -- User 01:16</p> <p>7 Data -- Data User header -- I apologize. I don't have 01:16</p> <p>8 the exact code name. 01:16</p> <p>9 In the end it was determined that the accuracy 01:16</p> <p>10 of using that header as the indication for incognito 01:16</p> <p>11 mode is rather low. And, again, I am not a Chrome 01:16</p> <p>12 engineer, so I do not know the specifics around the 01:16</p> <p>13 header. 01:16</p> <p>14 My understanding is that the absence of the 01:16</p> <p>15 header can be due to a variety of reasons, one of which 01:16</p> <p>16 can be incognito mode, but it can also -- the header can 01:16</p> <p>17 also be absent for a large number of other reasons. 01:16</p> <p>18 Q. Right. 01:16</p> <p>19 But you would agree that at least in Chrome, 01:16</p> <p>20 all incognito traffic would not include the 01:16</p> <p>21 X-Client-Data header generally. 01:16</p> <p>22 Isn't that correct? 01:17</p> <p>23 MR. ANSORGE: Objection. Vague. Form and 01:17</p> <p>24 foundation. 01:17</p> <p>25 THE WITNESS: Again, I'm not a Chrome 01:17</p> <p style="text-align: right;">Page 136</p>
<p>1 And my question is can you build that? 01:14</p> <p>2 MR. ANSORGE: Objection. Vague. Foundation. 01:14</p> <p>3 THE WITNESS: I'm not certain if we can build 01:14</p> <p>4 that or not. 01:14</p> <p>5 BY MR. MAO: 01:14</p> <p>6 Q. Why are you not certain? 01:14</p> <p>7 A. Because of the technical constraints that I 01:14</p> <p>8 mentioned because of the lack of a reliable way of 01:14</p> <p>9 detecting incognito, I'm not sure if such a signal can 01:14</p> <p>10 be built. 01:14</p> <p>11 Q. So tell me a little bit about what was the 01:14</p> <p>12 problem that you ran into when you were trying to detect 01:14</p> <p>13 in incognito mode? 01:14</p> <p>14 MR. ANSORGE: Objection. Vague. 01:14</p> <p>15 THE WITNESS: I can't comment on the detailed 01:15</p> <p>16 implementation of Chrome so I can only comment from an 01:15</p> <p>17 ads perspective. 01:15</p> <p>18 We were not able to reliably detect incognito 01:15</p> <p>19 mode because there is no apparent differences or signals 01:15</p> <p>20 that are unique to the incognito mode as opposed to 01:15</p> <p>21 non-incognito mode. 01:15</p> <p>22 For example, incognito mode blocks third-party 01:15</p> <p>23 cookies today but third-party cookies can also be absent 01:15</p> <p>24 for a large number of other reasons that are not a 01:15</p> <p>25 result of incognito mode. 01:15</p> <p style="text-align: right;">Page 135</p>	<p>1 engineer, so I do not know the exact conditions under 01:17</p> <p>2 which the header may or may not be sent. 01:17</p> <p>3 My understanding is in general, incognito mode 01:17</p> <p>4 will not carry that header, but also a large number of 01:17</p> <p>5 scenarios will also lead to the absence of the header. 01:17</p> <p>6 BY MR. MAO: 01:17</p> <p>7 Q. Right. 01:17</p> <p>8 But are you aware of situations where the 01:17</p> <p>9 X-Client-Data header would be included in incognito 01:17</p> <p>10 mode? 01:17</p> <p>11 MR. ANSORGE: Objection -- 01:17</p> <p>12 THE WITNESS: No. 01:17</p> <p>13 MR. ANSORGE: -- vague. Form and foundation. 01:17</p> <p>14 BY MR. MAO: 01:17</p> <p>15 Q. So you say "No." 01:17</p> <p>16 Is the reason for -- so it sounds like what 01:17</p> <p>17 you're saying is that inaccuracy is one of 01:17</p> <p>18 over-inclusiveness; right? In other words, you're 01:17</p> <p>19 saying the lack of the X-Client-Data header, even though 01:17</p> <p>20 you're not aware of incognito mode ever carrying the 01:17</p> <p>21 X-Client-Data header, the lack of the X-Client-Data 01:17</p> <p>22 header to you, as a non-Chrome engineer, at least is not 01:17</p> <p>23 indicative of the incognito mode. 01:18</p> <p>24 Did I say that correctly? 01:18</p> <p>25 MR. ANSORGE: Objection. Form and narrative. 01:18</p> <p style="text-align: right;">Page 137</p>

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<p>1 THE WITNESS: As far as I'm aware -- and I do 01:18</p> <p>2 not know the specific implementation of the Chrome 01:18</p> <p>3 header in question here. 01:18</p> <p>4 But my general understanding is incognito mode 01:18</p> <p>5 does not carry this header. I do not know if the 01:18</p> <p>6 opposite is true or not. 01:18</p> <p>7 BY MR. MAO: 01:18</p> <p>8 Q. Got it. 01:18</p> <p>9 So are there not other ways that can be custom 01:18</p> <p>10 built to signal to [REDACTED] that, hey, this is incognito 01:18</p> <p>11 traffic? 01:18</p> <p>12 MR. ANSORGE: Objection. Form. 01:18</p> <p>13 THE WITNESS: As I stated earlier, there isn't 01:18</p> <p>14 a reliable signal that we are aware of that can be used 01:18</p> <p>15 to infer incognito mode. And as a result, I cannot 01:19</p> <p>16 think of a way of building a mechanism to reliably 01:19</p> <p>17 detect incognito mode. 01:19</p> <p>18 BY MR. MAO: 01:19</p> <p>19 Q. At least from the [REDACTED] side; right? Or is your 01:19</p> <p>20 opinion also opining on whether or not Chrome can be 01:19</p> <p>21 built to convey that this is incognito mode? 01:19</p> <p>22 A. I cannot speak for Chrome. 01:19</p> <p>23 Q. Even though you're not a Chrome engineer, you 01:19</p> <p>24 would agree with me that surely Chrome can be built to 01:19</p> <p>25 signal that something is in incognito mode, wouldn't you 01:19</p> <p style="text-align: right;">Page 138</p>	<p>1 Do I understand your questions correctly? 01:20</p> <p>2 Q. Yes. We can answer it in that order. That's 01:20</p> <p>3 perfectly fine. 01:20</p> <p>4 Let's start with the logs and then let's start 01:21</p> <p>5 with [REDACTED] ability in that role. 01:21</p> <p>6 A. As I stated before, we do not have a reliable 01:21</p> <p>7 signal to infer incognito mode at this time we receive 01:21</p> <p>8 an ad query. And as a result, we are also unable to 01:21</p> <p>9 infer incognito mode using the same set of signals from 01:21</p> <p>10 the logs. 01:21</p> <p>11 Q. So you would have no way of looking at the 01:21</p> <p>12 logs and knowing what is incognito mode traffic to be 01:21</p> <p>13 removed, if I needed to remove incognito traffic or not. 01:21</p> <p>14 Isn't that correct? 01:21</p> <p>15 A. To the best of my knowledge, there exists no 01:21</p> <p>16 way to definitively know the incognito state of a given 01:21</p> <p>17 ad query. 01:21</p> <p>18 Q. If the Court were in this case to order Google 01:21</p> <p>19 to delete all log entries containing incognito traffic, 01:21</p> <p>20 at least sitting from the perspective of the head of 01:22</p> <p>21 product of [REDACTED] is there a way in which you can see 01:22</p> <p>22 within your purview of how we go about doing that? 01:22</p> <p>23 MR. ANSORGE: Objection. Form. Vague. And 01:22</p> <p>24 incomplete hypothetical. 01:22</p> <p>25 THE WITNESS: Because of the lack of reliable 01:22</p> <p style="text-align: right;">Page 140</p>
<p>1 agree? 01:19</p> <p>2 MR. ANSORGE: Objection. Form. Foundation. 01:19</p> <p>3 THE WITNESS: I do not have the necessary 01:19</p> <p>4 knowledge to assess that statement. 01:19</p> <p>5 BY MR. MAO: 01:19</p> <p>6 Q. Okay. So then let me ask you the opposite. 01:19</p> <p>7 As a result of that, how would [REDACTED] when it's 01:19</p> <p>8 looking at the traffic that has already been generated, 01:19</p> <p>9 know whether or not something was in incognito mode? 01:19</p> <p>10 MR. ANSORGE: Objection. Vague. Form. 01:19</p> <p>11 BY MR. MAO: 01:20</p> <p>12 Q. Let me give you a better example, something a 01:20</p> <p>13 little more clear. 01:20</p> <p>14 If I were to say I wanted to delete all 01:20</p> <p>15 entries of logs in the ad query log, for example, that 01:20</p> <p>16 we had just looked at, that were generated as a result 01:20</p> <p>17 of being somebody in X -- somebody in incognito mode, 01:20</p> <p>18 am I able to use [REDACTED] to identify those entries and 01:20</p> <p>19 delete it from the logs? 01:20</p> <p>20 A. I think there are two parts to your question, 01:20</p> <p>21 and the first part is whether or not it is technically 01:20</p> <p>22 feasible to detect incognito from the logs. 01:20</p> <p>23 And the second part of your question was 01:20</p> <p>24 whether or not [REDACTED] can be the place to -- for that to 01:20</p> <p>25 happen? 01:20</p> <p style="text-align: right;">Page 139</p>	<p>1 signals to infer incognito mode, we will not be able to 01:22</p> <p>2 definitively identify incognito traffic or log entries 01:22</p> <p>3 from this system. 01:22</p> <p>4 BY MR. MAO: 01:22</p> <p>5 Q. Got it. 01:22</p> <p>6 Let me move down two pages on this exhibit to 01:22</p> <p>7 Exhibit -- I'm sorry -- page 61 there -- it's page 6, 01:22</p> <p>8 dash 61 on the bottom. 01:23</p> <p>9 A. Dash 61. I have it. 01:23</p> <p>10 Q. Great. 01:23</p> <p>11 My question to you is -- and I'm going to give 01:23</p> <p>12 you some time to look at this. 01:23</p> <p>13 My question to you is what is that thing all 01:23</p> <p>14 the way on the right there, "Aggregated Unified 01:23</p> <p>15 Identifier Producer"? 01:23</p> <p>16 A. I'll take a brief moment to read through the 01:23</p> <p>17 boxes on this slide. 01:23</p> <p>18 Q. Please. 01:23</p> <p>19 A. Okay. 01:23</p> <p>20 Q. What exactly is that "Aggregated Unified 01:23</p> <p>21 Identifier Producer" right there? 01:23</p> <p>22 A. The aggregated unified identifier producer is 01:23</p> <p>23 a producer which is an implementation of a logical unit 01:24</p> <p>24 in [REDACTED] 01:24</p> <p>25 Its main purpose is to take the output from 01:24</p> <p style="text-align: right;">Page 141</p>

EXHIBIT 9

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EXHIBIT 10

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EXHIBIT 11

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EXHIBIT 12

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EXHIBIT 14

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EXHIBIT 15

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Entirety

EXHIBIT 16

Redacted in its
Entirety

EXHIBIT 17

Sealed in its
Entirety

EXHIBIT 18

Redacted in its
Entirety

EXHIBIT 19

Redacted Version of
Document Sought to
be Sealed

CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

CHASOM BROWN, MONIQUE
TRUJILLO, WILLIAM BYATT, JEREMY
DAVIS, and CHRISTOPHER CASTILLO,
individually and on behalf of all similarly
situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 5:20-cv-03664-YTG-SVK

**DEFENDANT’S OBJECTIONS AND RESPONSES TO PLAINTIFFS’
INTERROGATORIES SET 9 (NOS. 34-40)**

Pursuant to Federal Rule of Civil Procedure 33, Defendant Google LLC ("Google") hereby responds and objects to Plaintiffs' Interrogatories, Set 9 (Nos. 34-40). These objections and responses are made solely for the purpose of and in relation to this action. In addition, the objections and responses set forth in this document are based on Google's knowledge, investigations, and analysis to date. As discovery proceeds, Google may become aware of additional facts or evidence and its analysis of the case may change. Google reserves all rights to supplement and amend its objections and responses accordingly.

GENERAL OBJECTIONS

1. Google objects to Plaintiffs' Definitions, Instructions, and interrogatories to the extent they seek information and/or records that are not reasonably accessible and whose inclusion is not proportional to the needs of the case.

2. Google objects to the definition of “browser” as vague and ambiguous to the extent it draws a distinction between “web-based browsers” and “app browsers.” All browsers are, by

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1 definition, web-based and require software to be run on a device, whether that device is a desktop
2 computer or a mobile device. Google will understand the term “browser” as referring to application
3 software that contains a graphical user interface for displaying and navigating between web pages.

4 3. Google objects to the definition of “browsing data” as overly broad and unduly
5 burdensome because it combines information pertaining to specific website visits (*e.g.*, “HTTP
6 request,” “hostname”) with basic information about the browser (*e.g.*, “browser type,” “language”).
7 Google further objects to the definition of “browsing data” as vague and ambiguous due to the
8 inclusion of “‘fingerprint’ data (as described in paragraphs 100-104).” Paragraphs 100-104 of the
9 Complaint describes “images, pixels, or fonts”—that is neither “fingerprint data” nor data Google
10 uses to fingerprint users. Google further objects to the definition of “browsing data” as vague and
11 ambiguous due to the inclusion of “geolocation data.” Google will treat “geolocation data” as
12 referring to precise latitude and longitude information that is collected from a mobile device.
13

14 4. Google objects to the interrogatories to the extent that they seek information shielded
15 from disclosure by the attorney-client privilege, the work-product doctrine, the settlement privilege
16 and/or any other applicable privilege or protection from discovery.
17

18 5. Google objects to Plaintiffs' Definitions, Instructions, and interrogatories to the
19 extent they conflict with or encompass information and/or records falling outside the scope of
20 discovery under the Federal Rules of Civil Procedure, the local rules of the Northern District of
21 California, or any discovery orders governing this case.
22

23 6. Google's responses to these interrogatories are hereby made without waiving or
24 intending to waive, but rather, to the contrary, by preserving and intending to preserve:

- 25 a. All questions as to the competence, relevance, proportionality, materiality,
26 and admissibility as evidence for any purpose of the information or
27
28

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documents, or the subject matter thereof, in any aspect of this action or any other court action or judicial or administrative proceeding or investigation;

b. The right to object on any ground to the use of any such information or documents, or the subject matter thereof, in any aspect of this action or any other court action or judicial or administrative proceeding or investigation;

c. The right to object at any time in connection with any further response to these or any other interrogatories; and

d. The right at any time to supplement its responses.

7. Google anticipates that future discovery, independent investigation, or analysis will supply additional facts and add meaning to known facts, as well as establish new factual conclusions and legal contentions, all of which may lead to additions to, changes in, and variations from the responses set forth herein. Google reserves the right to modify, supplement, withdraw, or otherwise alter its responses to these interrogatories in accordance with the Federal Rules of Civil Procedure, the local rules of the Northern District of California, or any discovery orders governing this case.

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 34:

Please identify every log and data source that Google reviewed, analyzed, or searched as part of Google’s efforts to conduct a “log analysis of Chrome Incognito” in and around mid-2020. See, e.g., GOOG-CABR-05280756.

RESPONSE TO INTERROGATORY NO. 34:

Google incorporates its General Objections as if set forth fully herein. Google further objects to this interrogatory as it mischaracterizes the cited document and an analysis performed by a small number of Google employees. Google further objects to the undefined phrase “every log and data source that Google reviewed, analyzed, or searched” as overly broad, unduly burdensome, vague, and ambiguous. For the purposes of this response, Google understands this phrase to refer to the

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1 log sources that Google used to perform the analysis described in GOOG-CABR-05280756. Google
 2 further objects to this interrogatory as unduly burdensome to the extent it purports to seek
 3 information regarding Google Search Search Ads because Plaintiffs have expressly limited their
 4 purported class to users “who accessed a non-Google website containing Google Analytics or Ad
 5 Manager.” Dkt. 136-1 ¶ 192; *see also* June 2, 2021 Hearing Tr. 35:13-16 (discovery “is not carte
 6 blanche to all of Google’s systems . . . and it will continue to tie back to the proper definitions of
 7 the class”). Google further objects to this interrogatory to the extent it is tailored to seek information
 8 protected by the attorney-client privilege, the work product doctrine, or the common interest
 9 doctrine, or that is otherwise privileged or protected from discovery.
 10

11 Subject to and without waiving the foregoing objections, Google responds as follows:

12 Google used [REDACTED] in the analysis of Ad Manager browsing traffic
 13 described in GOOG-CABR-05280756.
 14

INTERROGATORY NO. 35:

15
 16 Aside from Google’s mid-2020 “log analysis of Chrome Incognito” (e.g., GOOG-CABR-
 17 05280756), please describe in detail any other log-based analysis of Chrome Incognito that Google
 18 conducted, including the data sources involved and the results of any such analysis.

RESPONSE TO INTERROGATORY NO. 35:

19
 20 Google incorporates its General Objections as if set forth fully herein. Google further objects
 21 to this interrogatory as it mischaracterizes the cited document and an analysis performed by a small
 22 number of Google employees for a specific purpose. Google further objects to this interrogatory as
 23 vague and ambiguous as to the phrase “any other log-based analysis of Chrome Incognito that
 24 Google conducted,” which is neither self-evident nor defined. As written, this undefined phrase is
 25 unintelligible, overly broad, and unduly burdensome because it does not explain, *inter alia*, what
 26 constitutes “log-based analysis” or how any such analysis would need to relate to Incognito mode
 27 on the Chrome browser in order to be responsive to this request. For the purposes of this response,
 28

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1 Google understands this phrase to refer to other analyses employing the methodology for estimating
2 or inferring certain Incognito aggregate usage metrics described in GOOG-CABR-05280756, as
3 applied to Ad Manager. Google further objects to this interrogatory to the extent it is tailored to seek
4 information protected by the attorney-client privilege, the work product doctrine, or the common
5 interest doctrine, or that is otherwise privileged or protected from discovery.
6

7 Subject to and without waiving the foregoing objections, Google responds as follows:

8 Google has not identified information responsive to this interrogatory after conducting a
9 reasonable search.

INTERROGATORY NO. 36:

11 For the Class Period, please identify Incognito usage statistics for the USA, broken down by
12 (1) the number of unique chrome instances within the United States, (2) the number of unique
13 chrome instances within California that used Chrome Incognito, and (3) the number of unique
14 chrome instances within the United States that used Chrome Incognito.
15

RESPONSE TO INTERROGATORY NO. 36:

17 Google incorporates its General Objections as if set forth fully herein. Google objects to this
18 request as vague and ambiguous as to the phrases “the number of unique chrome instances” and
19 “Incognito usage statistics,” which are neither self-evident nor defined. Google further objects that
20 this interrogatory is overly broad and unduly burdensome because at least Subpart (1) of this
21 interrogatory seeks information for users who are not included in Plaintiffs’ class definition. Google
22 further objects to this interrogatory as compound because it includes at least three sub-parts.
23

24 Subject to and without waiving the foregoing objections, Google responds as follows:

25 (1) Google maintains information in the ordinary course of business that can be used to
26 show the number of unique Chrome instances that appear to be in the United States during a 28-day
27 period ending on the first of the month from June 1, 2016 to January 1, 2022. Based on Google’s
28 investigation to date, that information is set forth below.

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SERVICE LIST

Brown v. Google LLC

Case No. 5:20-cv-03664-LHK-SVK

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Calhoun v. Google LLC

Case No. 5:20-cv-5146-LHK-SVK

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EXHIBIT 20

Redacted Version of
Document Sought to
be Sealed

From: owner-googleteam@lists.susmangodfrey.com on behalf of [Mark C. Mao](#)
To: [Josef Ansorge](#); [Ryan McGee x3030](#); [Timothy Schmidt](#); [Douglas Brush](#)
Cc: [QE Brown](#); GOOGLETEAM@lists.susmangodfrey.com
Subject: Re: Brown ((20-3664) Calhoun (20-5146) v. Google - Informal Meet and Confer Conferences this Wednesday - Confidential
Date: Wednesday, February 23, 2022 8:17:34 PM

EXTERNAL Email

Mr. Ansorge. Thank you for confirming that you did not provide that field in the schema. Please produce updated schemas containing that field.

Get [Outlook for iOS](#)

From: Josef Ansorge <josefansorge@quinnemanuel.com>
Sent: Wednesday, February 23, 2022 5:06:21 PM
To: Mark C. Mao <mcao@BSFLLP.com>; Ryan McGee x3030 <rmcgee@forthepeople.com>; Timothy Schmidt <timothy.schmidt@accelconsulting.llc>; Douglas Brush <douglas.brush@accelconsulting.llc>
Cc: QE Brown <qebrown@quinnemanuel.com>; GOOGLETEAM@lists.susmangodfrey.com
<GOOGLETEAM@lists.susmangodfrey.com>
Subject: Re: Brown ((20-3664) Calhoun (20-5146) v. Google - Informal Meet and Confer Conferences this Wednesday - Confidential

Mr. Mao:

Our understanding is that the log source [REDACTED] has a field named maybe_chrome_incognito_do_not_use_without_consulting_ads_identity_team.

As we have explained before, [REDACTED] lists the largest 100 fields in a given [REDACTED] log. If the field maybe_chrome_incognito_do_not_use_without_consulting_ads_identity_team is not one of the largest 100 fields, then it won't be listed in [REDACTED].

Please let us know what time tomorrow afternoon you would like to meet and confer.

Best,

Josef Ansorge
Of Counsel,
Quinn Emanuel Urquhart & Sullivan, LLP

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From: Mark C. Mao <mcao@BSFLLP.com>
Sent: Wednesday, February 23, 2022 7:18:43 PM
To: Ryan McGee x3030 <rmcgee@forthepeople.com>; Timothy Schmidt <timothy.schmidt@accelconsulting.llc>; Douglas Brush <douglas.brush@accelconsulting.llc>
Cc: QE Brown <qebrown@quinnemanuel.com>; GOOGLETEAM@lists.susmangodfrey.com <GOOGLETEAM@lists.susmangodfrey.com>
Subject: RE: Brown ((20-3664) Calhoun (20-5146) v. Google - Informal Meet and Confer Conferences this Wednesday - Confidential

[EXTERNAL EMAIL from mcao@bsfllp.com]

Mr. Ansorge: In addition to the question below, I am also open tomorrow and Friday to meet and confer with you as requested by the Special Master.

Special Master Brush and Mr. Schmidt – After Mr. Ansorge gives me a time to meet and confer, I will send out proposals for another meeting with you, prior to the next regular scheduled meeting. Thank you.

From: Mark C. Mao
Sent: Wednesday, February 23, 2022 2:01 PM
To: Ryan McGee x3030 <rmcgee@forthepeople.com>; Timothy Schmidt <timothy.schmidt@accelconsulting.llc>; Douglas Brush <douglas.brush@accelconsulting.llc>
Cc: QE Brown <qebrown@quinnemanuel.com>; GOOGLETEAM@lists.susmangodfrey.com
Subject: RE: Brown ((20-3664) Calhoun (20-5146) v. Google - Informal Meet and Confer Conferences this Wednesday - Confidential

Mr. Ansorge:

I looked at the [REDACTED] log you identified, and there is no field for the detect-Incognito bit. We looked at every field.

Which field from this schema would that bit be located? Please let us know that quickly.

Thank you in advance.

From: Ryan McGee x3030 <rmcgee@forthepeople.com>
Sent: Tuesday, February 22, 2022 5:11 PM
To: Timothy Schmidt <timothy.schmidt@accelconsulting.llc>; Douglas Brush <douglas.brush@accelconsulting.llc>

Cc: QE Brown <gebrown@quinnemanuel.com>; GOOGLETEAM@lists.susmangodfrey.com; Mark C. Mao <mmao@BSFLLP.com>

Subject: RE: Brown ((20-3664) Calhoun (20-5146) v. Google - Informal Meet and Confer Conferences this Wednesday - Confidential

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Dear Special Master Brush, Mr. Schmidt, and Counsel:

The *Brown* Plaintiffs propose the following agenda for our session:

1. Field Descriptions and Schema
 - Plaintiffs want to know when they will receive the field descriptions that the Special Master ordered on December 15, 2021 (see attached email)
 - Plaintiffs also want to know when they can expect schemas for all logs that Bert Leung used for his Incognito analysis
2. Any Withheld Information
 - Has Google limited or withheld any production of fields from the data sources, including Search and detect-Incognito bits. If so, when, which, and why?
3. Incognito Detection Bit
 - Please identify all data sources that contain or contained the Incognito Detection bit.
4. Identifiers & Data Sources
 - Are there any identifiers that Plaintiffs have submitted that do not exist in the data sources requested to be searched with those identifiers?
5. Plaintiffs' Data
 - Googled stated it would search [REDACTED] and produce the results to the Special Master for review; when can Plaintiffs expect that production?
6. Searching Historical Data (more than 8 days)
 - What has Google done to search for historical data?
7. Finishing Iterative Search 1

Thank you,
Ryan

Ryan McGee
Attorney
[My Bio](#)

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A referral is the best compliment. If you know anyone that needs our help, please have them call our office 24/7.

From: Timothy Schmidt <timothy.schmidt@accelconsulting.llc>

Sent: Tuesday, February 22, 2022 3:51 PM

To: QE Calhoun <qecalhoun@quinnemanuel.com>; QE Brown <qebrown@quinnemanuel.com>; GOOGLETEAM@lists.susmangodfrey.com; Lesley Weaver <lweaver@bfalaw.com>; David Straite <dstraite@dicellolevitt.com>; jaybarnes@simmonsfirm.com; Mark C. Mao <mmao@bsfillp.com>; Sharon Cruz <scruz@dicellolevitt.com>; Ryan McGee x3030 <rmcgee@forthepeople.com>; Adam Prom <aprom@dicellolevitt.com>; Angelica Ornelas <aornelas@bfalaw.com>

Cc: Douglas Brush <douglas.brush@accelconsulting.llc>

Subject: *EXT* Brown ((20-3664) Calhoun (20-5146) v. Google - Informal Meet and Confer Conferences this Wednesday - Confidential

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All,

In light of our upcoming informal conferences tomorrow, Special Master Brush and I have discussed and continue to review your submissions.

If you have further (brief) submissions for Special Master Brush, he will be taking those only until 5:00 pm EST today to have adequate time to prepare for the sessions thoughtfully.

Please also work together (Plaintiffs and Google) in preparing agendas for the conferences. As before, Mr. Brush has asked that these agendas be joint submissions with bullet points and only the necessary technical language to support issues. These are due no later than 8:00 pm EST, today.

Thank you,
Tim Schmidt

Timothy Schmidt

Consultant

M 202.577.5302

E timothy.schmidt@accelconsulting.llc

Accel Consulting LLC

BOULDER, CO 80301

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